Supreme Court, U.S.
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No. 09-570

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In The
Supreme Court of the United States

STATE OF DELAWARE,

Petitioner,

v.

JAMES E. COOKE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Delaware

PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)
QUESTIONS PRESENTED FOR REVIEW

James E. Cooke faced a death sentence for the horrific rape and murder of Lindsey Bonistall. With Cooke's cooperation, his experienced defense team engaged in exhaustive pre-trial investigation and litigation that sought to exclude much of the State's case for guilt. At the same time, they developed a case that Cooke was guilty but mentally ill (GBMI), a strategy to mitigate his criminal responsibility and potential sentence. When their pre-trial efforts excluded little of the "avalanche of evidence" against Cooke, his attorneys knew that the GBMI case developed, and later presented, was the only plausible strategy that could meet the ultimate goal of avoiding his execution. Heading into jury selection, however, Cooke's one-time disquiet with a GBMI strategy evolved into overt dissent, expressed both to the trial judge and before the jury. Cooke was convicted and sentenced to death. The questions presented here are:

1. Whether a criminal defendant has a fundamental constitutional right to direct his counsel to present a "factual innocence-based defense" irrespective of counsel's professional judgment.

2. Whether an unresolved disagreement between counsel and defendant regarding pursuit of a "concession-of-guilt and mitigation" defense constitutes a conflict of interest that violates the defendant's Sixth Amendment right to counsel.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case as printed on the cover page.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Delaware, on behalf of the State of Delaware, respectfully petitions for a writ of certiorari to review the judgment of the Delaware Supreme Court in this case.

OPINIONS BELOW

The opinion of the Delaware Supreme Court reversing respondent's convictions and death sentence is officially published at 977 A.2d 803. (App. 1-143). The sentencing decision of the Delaware Superior Court is not officially reported but is available at 2007 WL 2129018. (App. 144-265). The opinion of the Delaware Supreme Court denying the prosecution's pre-trial petition for a writ of mandamus is officially published at 918 A.2d 1151. (App. 268-82).

STATEMENT OF JURISDICTION

The judgment of the Delaware Supreme Court was entered July 21, 2009.[1] On October 16, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including

[1] Delaware appellate practice does not provide for any separate document known as a judgment. Instead, the Clerk of the state supreme court enters a docket notation based on the final paragraph of the written decision. *See* DEL. CODE ANN. tit. 10, § 162 (Supp. 2008).

November 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. Although the judgment of the Delaware Supreme Court reversed respondent's convictions and remanded for a new trial, the judgment is final for purposes of review by this Court because Delaware law would preclude, in the event of an acquittal upon retrial, a subsequent prosecution appeal of the federal issue now presented.[2] *See Kansas v. Marsh*, 548 U.S. 163, 167 (2006).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. The Sixth Amendment is applicable to the states through the Fourteenth Amendment. U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

A state grand jury in August 2005 indicted respondent James E. Cooke, charging him with two

[2] *See* DEL. CODE ANN. tit. 11, §§ 9902(d), 9902(e), 9903 (Supp. 2008).

counts of first degree murder and related offenses, stemming from the May 1, 2005 rape and killing of University of Delaware coed Lindsey Bonistall and two other burglaries that had occurred nearby in the several days before the murder. After a six-week trial, a jury convicted respondent of all of the charged crimes. After a penalty hearing, respondent was sentenced to death for each of the murder convictions. On appeal, the state supreme court, by a vote of 3 to 2, reversed the convictions and sentences. (App. 1-143).

1. On the night of April 26, 2005, the apartment of Cheryl Harmon in Newark, Delaware was burglarized. When Harmon returned home at about 11:30 p.m. that night, she found written on the living room wall in bright red nail polish, "We'll be back." More warnings were found in the bathroom and bedroom. Various items had been taken from the apartment, including two rings engraved with Harmon's name. (App. 4).

On the night of April 29, graduate student Amalia Cuadra awoke in her Newark apartment to an intruder standing in her bedroom, shining a light in her face. Cuadra, thinking it was her roommate, called out "Carolina? Carolina?" The intruder told Cuadra to keep quiet and demanded she give him money. As Cuadra complied and retrieved her wallet, she grabbed her cell phone. When she gave the intruder $45 in cash, he then demanded her credit cards. Cuadra surrendered two. She then dialed "911" on the cell phone, but did not hit send. The intruder

demanded that Cuadra unrobe, but she instead screamed out her roommate's name several times. The intruder attempted to take the cell phone, but when he saw 911 on the screen, he fled. In addition to the cash and credit cards, the intruder took Cuadra's backpack which contained a luggage tag bearing her name, diet pills in a silver metal container, and an iPod. (App. 5).

During the early morning hours of May 1, an intruder entered the apartment of Lindsey Bonistall. The burglar encountered Bonistall in her bedroom, attacking her there. Bonistall was beaten, bound and gagged, and she was strangled with a knotted t-shirt. The assailant then raped Bonistall and strangled her to death. In an effort to eliminate biological evidence, the assailant doused Bonistall's body with bleach. He then placed Bonistall's body in the bathtub; after covering her with pillows, a wicker basket, and a guitar, he lit a fire. Before starting the fire, however, the killer scrawled various statements in blue marker on the walls and countertops. (App. 5-7).

The fire awakened neighbors at about 3 a.m. The Fire Marshal discovered Bonistall's body late that morning, under portions of the melted bathtub wall that had collapsed on top of her. The medical examiner determined the cause of death to be strangulation. (App. 7).

2. In the early morning hours of April 30, respondent had returned to his Newark residence where he lived with his girlfriend, Rochelle Campbell,

and their children. Seeing Cuadra's backpack, Campbell asked respondent about it. Campbell saw an iPod in the bag, a tin-looking container, and a name tag bearing a "Spanish" name. (App. 7-8).

After giving some excuse for having Cuadra's backpack, respondent showed Campbell her credit cards and discussed trying to use them at a nearby automatic teller machine. Campbell told him to take the bag and cards away and not bring them back. (App. 151). Respondent left to use the cards. Surveillance video from the bank showed respondent as he attempted to do so. Co-workers, neighbors, and Campbell all identified respondent as the person in the video. (App. 8).

After Bonistall's murder, respondent, while attempting to disguise his voice, made three calls to the Newark Police 911 call center. During these calls, respondent identified himself as "John Warn" and claimed to have knowledge of Bonistall's murder and the Harmon and Cuadra home invasions. Although those crimes had not yet been linked by the police, respondent used the names of two of the other home invasion victims ("Cheryl" and "Carolina," pronounced as Cuadra said it, "Caroleena"), and he gave details about each of the three crimes that had not been released to the public. Campbell subsequently testified that the caller's voice was that of respondent. (App. 8-9, 157).

Handwriting analysis of the writing on the walls of Bonistall's and Harmon's apartments included

respondent as the writer. Material recovered from underneath Bonistall's fingernails revealed a mixture of Bonistall's and respondent's DNA. In addition, DNA was extracted from the semen sample taken from Bonistall's vaginal area. Analysis of that sample established the probability of the DNA coming from anyone other than respondent being at least 1 in 676,000,000,000,000,000,000. (App. 9).

3. When respondent faced trial for the brutal rape and murder of Lindsey Bonistall, the ultimate goal was escaping Delaware's execution chamber. He wanted his two respected and experienced criminal defense attorneys to achieve this goal by convincing a jury that he was not the man who beat, raped, strangled and then set Lindsey afire. An exhaustive pre-trial investigation and tenacious course of pre-trial litigation[3] challenged the admissibility and validity of the evidence of respondent's actual identity as Bonistall's killer, but to little avail. *State v. Cooke*, 2006 WL 2620533 (Del. Super. Ct. Sept. 8, 2006) (denying suppression); *State v. Cooke*, 914 A.2d 1078,

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[3] In various pre-trial proceedings, the defense team had filed a motion for a proof positive hearing; two motions to suppress physical evidence; nine motions *in limine* to exclude different forms of expert testimony or scientific evidence; a motion for a change of venue; a motion for relief from prejudicial joinder; and a motion to declare the Delaware death penalty statute unconstitutional. *State v. Cooke*, 910 A.2d 279, 281 (Del. Super. Ct. 2006) (denying change of venue); *State v. Cooke*, 909 A.2d 596, 599 (Del. Super. Ct. 2006) (denying severance).

(Del. Super. Ct. 2007) (motions *in limine* – granting in part and denying in part).

Given this pre-trial litigation and the discovery that prosecutors had turned over, respondent's attorneys were fully aware of the overwhelming physical and scientific evidence of respondent's guilt that he faced at trial. Respondent, moreover, had confessed to his killing of Bonistall to both of his attorneys (App. 267), to a defense psychologist (App. 166-67), and to a pastoral counselor (App. 60-61). In the words of one of respondent's attorneys, the defense faced "an avalanche of evidence." (App. 64-65).

Counsel had also been developing, for more than a year, a strategy aimed at obtaining a verdict of guilty but mentally ill (GBMI).[4] Respondent met with

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[4] In 1982, Delaware adopted the verdict of "guilty but mentally ill" (GBMI). *Aizupitis v. State*, 699 A.2d 1092, 1096 (Del. 1997); *Daniels v. State*, 538 A.2d 1104, 1106-08 (Del. 1988). The jury must be instructed on GBMI any time the evidence adduced at trial warrants the instruction, "regardless of a defendant's desire to avoid it." *Daniels*, 538 A.2d at 1111. The defendant, however, is not required to disavow his innocence in order to have the jury instructed on GBMI; the prosecution must prove the defendant's guilt beyond a reasonable doubt before the jury can return a verdict of GBMI. *Sanders v. State*, 585 A.2d 117, 131 (Del. 1990).

A verdict of GBMI allows the court to impose the same sentence that could have been imposed, including a sentence of death, if the jury had returned a verdict of guilty. *Id.* at 124-25, 128-29. But in a capital murder prosecution, if the jury has returned a verdict of GBMI, Delaware law requires that the jury, at the penalty phase, "be instructed that a finding of guilty but mentally ill establishes mitigation as a matter of law. . . ." *Id.* at

(Continued on following page)

the defense psychologist six times and for more than twenty hours. (App. 164). He also was examined by a defense psychiatrist (App. 172) and a psychiatrist retained by the State. (App. 188). Respondent was always compliant with the examinations and testing even though the doctors felt he was, at times, "playing" with them. (App. 167). The defense experts diagnosed respondent as having long-standing Schizotypal Personality Disorder (App. 164) and/or a Mixed Personality Disorder with a mixture of Schizoid/ Schizotypal and Paranoid features (App. 172); both diagnoses, they determined, could support a GBMI verdict. Even the diagnosis of Antisocial Personality Disorder advanced by the State's expert, in their view, did not foreclose an attempt to obtain a GBMI verdict. *See State v. Wallace*, 2007 WL 545563, *15 (Del. Super. Ct. Jan. 26, 2007) (diagnosis of conduct disorder could support verdict of GBMI).

Throughout the pre-trial investigation and preparation, respondent's attorneys met with him more than fifty times. (App. 267). They had fully informed him of the merits of the various defense options, including GBMI. During these consultations, respondent expressly rejected pursuit of a GBMI strategy insisting instead that his attorneys maintain his

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135. *See id.* at 133 ("a jury which proceeds to a punishment hearing following a guilty but mentally ill verdict must be made aware of the significance of its verdict, which constitutes a finding that the defendant's mental illness contributed to his culpability").

factual innocence and not present evidence that he was mentally ill. (App. 10-11). As trial neared, counsel had "agreed to disagree" with respondent over which defense strategy to pursue. (App. 11).

4. When, after the week-long jury selection and prior to the opening of evidence, the disagreement over the GBMI strategy was broached in court, defense counsel emphasized to the trial judge that they were not "conceding guilt here . . . We're going to challenge every shred of evidence, if appropriate, if we think it's appropriate in helping Mr. Cooke's defense . . . I'm going to tell [the jury] it's up to them to decide whether the State has proven guilt." Counsel further explained that respondent had not indicated that he wished to proceed *pro se*. He wanted his lawyers to represent him. Lastly, counsel noted that they "ha[d] made some progress in speaking with" respondent about the GBMI defense. (App. 21-22). As events at trial unfolded, however, it was clear that counsel and respondent were at an impasse regarding the defense employed.

In his opening statement, defense counsel performed as promised, telling the jury:

> We're not going to ask you to ignore substantial evidence presented by the State. We're simply going to ask you to look at all of the evidence that is presented during this trial. . . . *If*, based on the evidence presented you find him guilty, then consider all of the evidence and *if* you find to your satisfaction

> that the evidence establishes that he's mentally ill, say so. . . .

(App. 29-30) (emphasis added).[5]

There were numerous outbursts by respondent during trial.[6] Respondent complained often that his counsel "wasn't representing me right" and was "going over my head" because "[t]hey [we]re using their own strategies . . . to make it look like I'm this mentally ill person . . . [but] with this mental illness defense. I never agreed to none of that stuff." (App. 31-32, 40).

At the close of the guilt phase, after the "avalanche of evidence" had been presented, defense counsel told the jury:

> We have all heard Mr. Cooke's statement, "I'm not guilty. I'm not mentally ill." With all due respect to Mr. Cooke, the evidence proves that he's wrong on both counts. But you are the judges of that, you'll consider all

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[5] The trial judge later instructed the jury, "Before you can consider this possible verdict [GBMI] for any of these charges, however, you must first find that the State has established the defendant's guilt as to that charge beyond a reasonable doubt. If you find the defendant not guilty of any charge or charges, you do not consider this possible verdict as to that charge." (App. 195).

[6] The situation was such that the prosecution, during the early stages of the trial proceedings, applied to the Delaware Supreme Court for a writ of mandamus to resolve who controlled the GBMI versus "innocence-based" defense decision. The prosecution efforts were unsuccessful. (App. 268-82).

> of the evidence and reach your verdict. I'm confident that you will find Mr. Cooke guilty but mentally ill on all the counts.

(App. 77).

Respondent was found guilty of all charges, including those burglaries and associated offenses stemming from the invasions of the residences of Harmon and Cuadra. (App. 145-46). The jury unanimously recommended that respondent be sentenced to death on each of the murder convictions, and the trial judge imposed a death sentence on each. (App. 144-265).

5. Represented by different counsel on direct appeal, respondent's convictions and death sentences were reversed by a sharply divided Delaware Supreme Court.

a. The majority held that respondent's attorneys violated his Sixth Amendment rights by pursuing a defense of GBMI over his express objection, rather than presenting a defense of innocence. (App. 84). The majority held that trial counsel's GBMI strategy "deprived Cooke of his constitutional right to make fundamental decisions regarding his case," *i.e.*, the fundamental decision of whether to plead guilty. (App. 84, 85-87). Because of this disagreement over strategy, the majority found that a conflict developed between respondent and his counsel, manifested by respondent's frequent outbursts before the jury that resulted in his removal from the courtroom. (App. 91). Because of this conflict in the presentation of the

defense case, the majority concluded that respondent had not received the assistance of counsel in pursuing his chosen strategy, and that trial counsel did not subject the prosecution's case to meaningful adversarial testing. In so pursuing a GBMI strategy over respondent's objections, the majority found that respondent's attorneys undermined other trial rights of respondent. (App. 92-93).

The majority found that this Court's decision in *Florida v. Nixon*, 543 U.S. 175 (2004), did not require a different result. The defendant in *Nixon* was only unresponsive to, instead of affirmatively opposed to, his counsel's strategy to concede commission of the murder at the guilt phase as part of a strategy designed to avoid a death sentence during the penalty phase of the trial. (App. 94). Here, respondent expressly opposed counsel's strategy. This conflict between respondent and his counsel, the majority determined, meant that counsel's performance was to be analyzed under this Court's analysis in *United States v. Cronic*, 466 U.S. 648 (1984). (App. 99). The majority applied *Cronic* based on its view that respondent's conflict in strategy with his attorneys produced a complete breakdown in the adversarial process. (App. 102). Under *Cronic*, the majority presumed that respondent suffered prejudice from his attorneys' decision to argue to the jury for a verdict of GBMI. That, it found, required reversal of respondent's convictions. (App. 109).

b. The dissent viewed the correct analytical framework to be that set out in *Strickland v.*

Washington, 466 U.S. 668 (1984). (App. 121). The dissent too found this Court's decision in *Nixon* to be useful, but not controlling. (App. 126). The minority fundamentally disagreed with the majority's conclusion that respondent's trial attorneys did not subject the prosecution's case to adversarial testing. (App. 132-33). The minority recognized the overwhelming evidence the prosecution had presented against Cooke. (App. 128). Given this evidence of Cooke's guilt, and precisely because it was a capital murder prosecution, defense counsel's decision to pursue GBMI over Cooke's objections constituted a rational strategic decision. (App. 136-37).

REASONS FOR GRANTING THE PETITION

In *Florida v. Nixon*, this Court stated that "[w]e granted certiorari . . . to resolve an important question of constitutional law, *i.e.*, whether counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial automatically renders counsel's performance deficient." 543 U.S. 175, 186-87 (2004). The Court in *Nixon* established that when counsel employs a concession of guilt as a defense strategy, counsel's decision is to be assessed under the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984), even if the capital defendant is unresponsive to his counsel and only silently acquiesces to the strategy. *Nixon*, 543 U.S. at 192. But the Court's "heavy emphasis on the client's refusal to make a choice" suggests that "the *Nixon*

Court arguably was reserving for another day the question of whether the counsel could have insisted upon the strategy if the client had opposed it." 3 Wayne R. LaFave et al., CRIMINAL PROCEDURE § 11.6(b) at 790 (3d ed. 2007).[7] That question, starkly posed here, is just as important and should be resolved by this Court.

I. The Question of Who Has Ultimate Authority Over Whether to Employ an "Innocence-Based" or a "Concession-of-Guilt" Defense Is Important, Recurring and Has Led to a Conflict in Decisions of the Lower Federal and State Courts.

A. The Issue Presented Is a Recurring One That Concerns Core Principles Regarding Sixth Amendment Rights.

The Court has written that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Counsel, however, bears principal responsibility for the conduct of the defense. *See New York v.*

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[7] *Accord, e.g.*, *Woodward v. Epps*, 580 F.3d 318, 327 (5th Cir. 2009) (noting defendant's case might have "present[ed] a closer question" if defendant had expressed disagreement with counsel's strategy); Sharon G. Scudder, WITH FRIENDS LIKE YOU, WHO NEEDS A JURY? A RESPONSE TO THE LEGITIMIZATION OF CONCEDING A CLIENT'S GUILT, 29 Campbell L. Rev. 137, 155 (2006).

Hill, 528 U.S. 110, 114-15 (2000); *Jones*, 463 U.S. at 753 n.6. In particular, counsel has the responsibility for deciding "what arguments to pursue," *Hill*, 528 U.S. at 115 (citing *Jones*, 463 U.S. at 751), and "what defenses to develop." *Wainwright v. Sykes*, 433 U.S. 72, 93 & n.1 (1977) (Burger, C.J., concurring). Beyond those generalities, there are few, if any, guideposts. *Gonzalez v. United States*, 128 S.Ct. 1765, 1773-75 (2008) (Scalia, J., concurring in judgment); Christopher Johnson, THE LAW'S HARD CHOICE: SELF-INFLICTED INJUSTICE OR LAWYER-INFLICTED INDIGNITY, 93 Ky. L.J. 39, 48-64 (2004).

This Court's decision in *Nixon* did little to clarify the situation. The focus in *Nixon* was on whether counsel needed to obtain the defendant's express consent to the defense strategy, not who had the authority to make the decision. *See* 543 U.S. at 178-79 (referring to counsel's failure to obtain defendant's "express consent"). *See also* CRIMINAL PROCEDURE § 11.6(a) at 785 ("the issue before the Court in *Nixon* was not whether the strategy adopted by the attorney there was within the defendant's control"). Given the emphasis in *Nixon* on the defendant's failure to expressly object to counsel's strategy, courts often pry some finding of consent or taciturn acquiescence from the facts. *E.g.*, *Woodward*, 580 F.3d at 326-27; *Davenport v. DiGuglielmo*, 215 Fed. Appx. 175, 180 (3d Cir. 2007) (state courts implicitly found defendant consented to use of diminished capacity defense); *Pineo v. State*, 908 A.2d 632, 635-36 (Me. 2006); *Cade v. United States*, 898 A.2d 349, 354-55 (D.C. Ct. App.

2006); *Simmons v. Commonwealth*, 191 S.W.3d 557, 564-65 (Ky. 2006). But just as counsel sometimes are unable to obtain the defendant's express consent to concession-based defenses, counsel sometimes have clients who expressly object to those defenses, even though counsel have reasonably concluded that it is the only hope to avoid a death sentence.

And to state the obvious, the issue – who has the final word on the defense strategy – is a recurring one, not resolved by *Nixon*. The conflict between counsel and client, exemplified by respondent's trial, often involves the presentation of evidence of mental illness. *E.g.*, *United States v. Kaczynski*, 239 F.3d 1108, 1116-17 (9th Cir. 2001); *Jacobs v. Kentucky*, 870 S.W.2d 412 (Ky. 1994); *Treece v. State*, 547 A.2d 1054 (Md. 1988); Martin Sabelli & Stacey Leyton, TRAIN WRECKS AND FREEWAY CRASHES: AN ARGUMENT FOR FAIRNESS AND AGAINST SELF-REPRESENTATION IN THE CRIMINAL JUSTICE SYSTEM, 91 J. Crim. L. & Criminology 161, 164 (2000) ("An increasing number of mentally ill individuals enter the criminal process at the local, state, and federal level each year, and as in the *Kaczynski* case, resist presentation of evidence of mental illness."). But the question arises as well in the context of deciding whether to ask that the jury be instructed on or find the defendant guilty of lesser included offenses, *e.g.*, *Haynes v. Cain*, 298 F.3d 375, 382 (5th Cir. 2002) (en banc), *Arko v. People*, 183 P.3d 555 (Colo. 2008), or when counsel concedes that his client is guilty of some, but not all, of the charges. *E.g.*, *McNeill v. Polk*, 476 F.3d 206, 217-18 (4th Cir.

2007); *United States v. Fredman*, 390 F.3d 1153, 1156-57 (9th Cir. 2004). It also presents itself in deciding whether to present a theory of self-defense or an innocence-based defense. *E.g.*, *People v. Bergerud*, 203 P.3d 579 (Colo. Ct. App. 2008); *People v. Ramey*, 604 N.E.2d 275 (Ill. 1992). The question is, therefore, one that needs to be resolved.

B. The Decision Below Contributes to the Conflict Among Federal Circuits and State Supreme Courts Regarding Who in the Counsel-Defendant Relationship Has Ultimate Authority Over the Decision to Conduct a Concession-Based Defense.

A well-developed conflict has been long-emerging among federal circuits and state supreme courts as to whether a defense attorney's decision to employ a defense that concedes a defendant's guilt is a strategic choice within counsel's discretion, or whether the right to make such a decision is inextricably linked with a defendant's constitutional rights such that an unauthorized, and objected to, admission of guilt by one's attorney may violate the Sixth Amendment. Many courts view objected-to concessions as implicating certain fundamental decisions that are reserved personally for the accused, but many others characterize the concession of guilt as a strategic or tactical decision that defense counsel may make even over the express objection of the defendant.

The Delaware Supreme Court's decision conflicts with the decisions of at least four federal courts of appeals and one other state court of last resort, all of which have rejected the argument that a concession of guilt, employed without a defendant's consent or even over his objection, violates his fundamental decision making rights or otherwise "entirely fails to subject the prosecution's case to meaningful adversarial testing." *Haynes*, 298 F.3d at 380-82 & n.6; *Lingar v. Bowersox*, 176 F.3d 453, 458-59 (8th Cir. 1999) ("the decision to concede guilt of the lesser charge of second-degree murder [without discussion with or consent of defendant] was a reasonable tactical retreat rather than a complete surrender"); *Underwood v. Clark*, 939 F.2d 473, 474 (7th Cir. 1991) (counsel's concession during closing arguments of a lesser included offense without the consent of the defendant was "a sound tactic when the evidence is indeed overwhelming . . . and when the count in question is a lesser count, so that there is an advantage to be gained by winning the confidence of the jury"); *McNeal v. Wainwright*, 722 F.2d 674 (11th Cir. 1984) (attorney's statements conceding manslaughter during a murder trial were tactical and strategic, could be made without defendant's prior knowledge or consent, and did not constitute a forced guilty plea); *see also Allen v. Sobina*, 148 Fed. Appx. 90, 93 (3d Cir. 2005) (per curiam) (decision to concede defendant's killing of victim, in order to focus on avoiding death penalty, "is deemed 'tactical decision' after *Nixon*"). *People v. Ramey*, *supra* (defense theory "is a matter of trial tactics or strategy which is ultimately left

for trial counsel" and a defense of self-defense can be presented over an accused's wishes); *see also Arko v. People*, *supra* (decision whether to request instruction on lesser included offense of attempted murder was tactical, strategic decision to be made by counsel even over defendant's objection).

The reasoning of those courts is exemplified by the Fifth Circuit's decision in *Haynes*. In *Haynes*, the defendant faced a first degree murder charge and the death penalty in a case with overwhelming evidence of guilt. 298 F.3d at 377. The strategy of Haynes' attorneys, aimed solely at avoiding a first degree murder conviction and the possible death sentence, was to concede that the evidence established that Haynes kidnapped, raped and robbed the victim, but did not establish that Haynes intentionally killed her. Thus, they posited, Haynes only could be convicted for second degree murder. *Id.* at 377-78. Following the opening statement, Haynes objected to his attorneys' concessions, stated that he was innocent and told the court that he had specifically requested that his attorneys not make any concessions regarding his guilt for the commission of the offense. *Id.* at 378. Haynes requested new counsel, which the trial court denied, assuring him that he had excellent attorneys and could testify if he wished. The majority of the Fifth Circuit, drawing a strong dissent from the remainder of the court *en banc*, found no violation of Haynes' Sixth Amendment fundamental decision making rights and, more specifically, that his counsel did not

"abandon[] their client . . . [i]nstead, they continued to represent him throughout the course of the trial, adopting a strategy which in their judgment accorded Haynes the best opportunity for a favorable outcome." *Id.* at 382; *but see id.* at 384 (Parker, J., dissenting) (describing the fundamental issue in the case as whether the Constitution "give[s] a defendant the right to require his appointed counsel to contest every charged crime when the defendant informs the judge and his appointed counsel that he is innocent and wants an 'actual innocence' defense" . . . and in this case "[t]rial counsel's concession as to Haynes' guilt on the second degree murder charge can only be described as the functional equivalent to a forced guilty plea over the objection of the defendant").

By contrast, the majority of the Delaware Supreme Court, sounding in the voice of the *Haynes* dissent, and the Ninth Circuit have held that the decision to concede guilt implicates inherently personal rights which cannot be made by anyone other than the defendant and that doing so strips the defendant's trial of the meaningful adversarial character required under the Sixth Amendment. *See United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991) (applying *Cronic* where defense counsel conceded, during closing argument, that no reasonable doubt existed regarding the only factual issues in dispute); *but see United States v. Thomas*, 417 F.3d 1053, 1056 (9th Cir. 2005) (assuming that concession of guilt without consultation or consent was deficient but *Cronic* not applied); *see also United States v.*

Holman, 314 F.3d 837, 842 (7th Cir. 2002) (counsel's concession of defendant's guilt on one count during opening statement constituted deficient performance, absent evidence that defendant consented to concession). Several other state supreme courts have also adopted the view that a defendant has the Sixth Amendment right to present a defense of innocence that is not to be undermined by counsel's presentation of a concession of guilt defense. *State v. Carter*, 14 P.3d 1138 (Kan. 2000) (counsel's imposition of guilt-based defense against defendant's wishes – defendant's asserted defense was that he was innocent and denied any part in the charged offenses – violated his fundamental right to enter a plea of not guilty, interfered with his right to a fair trial, and deprived him of effective assistance of counsel); *Jacobs v. Kentucky*, 870 S.W.2d 412 (Ky. 1994) (defendant's right to present his defense on merits was denied by his counsel's presentation of insanity defense over his objection); *State v. Anaya*, 592 A.2d 1142, 1147 (N.H. 1991) (finding prejudice *per se* where counsel urged the jury to convict his client of a lesser-included offense, even though his client had refused to plea to that offense and had testified to his complete innocence); *Treece v. State*, 547 A.2d 1054 (Md. 1988) (criminal defendant, not his counsel or the court, is entitled to personally decide to defend on the basis of a plea of not criminally responsible by reason of insanity).

There is no reason to now delay resolution of the issue and await further dissension in the lower

courts. This Court's review is warranted to resolve the conflict to which the Delaware Supreme Court's decision contributes.

C. Resolution of the Question Is Important to the Management of Criminal Trials.

"[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence. . . ." *Neder v. United States*, 527 U.S. 1, 18 (1999) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)). There is an "inherent tension" between the right to counsel and the right to self-representation stemming from the defendant's interest in self-autonomy, an interest reflected in *Faretta v. California*, 422 U.S. 806 (1975). Sabelli & Leyton, 91 J. Crim. L. & Criminology at 168, 188, 190-95. The right to counsel exists to ensure that the government obtains convictions in fair trials. *Strickland*, 466 U.S. at 684-85. But the preference given by the Delaware Supreme Court to respondent's interest in controlling his own fate (App. 82-84) is little different from the position articulated by Justice Brennan in his dissent in *Jones*[8] and gives too little weight to the government's "compelling interest, related to its

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[8] 463 U.S. at 759 ("[The defendant] may want to press the argument that he is innocent, even if other strategems are more likely to result in the dismissal of charges or in a reduction of punishment. . . . [T]he proper role of counsel is to *assist* him in these efforts. . . ." (emphasis in original)).

own political legitimacy, in ensuring both fair procedures and reliable outcomes in criminal trials. . . ." *United States v. Farhad*, 190 F.3d 1097, 1105 (9th Cir. 1999) (Reinhardt, J., concurring). *See Sell v. United States*, 539 U.S. 166, 179-83 (2003) (noting that "the Government has a . . . constitutionally essential interest in assuring that the defendant's trial is a fair one.").

The professional responsibility rules also provide little, if any, guidance. Rule 1.2(a) of the Model Rules of Professional Conduct allocates to the client the power to determine the objectives of the representation while giving the attorney the control over the means to achieve the objectives. But to cast the issue in terms of "objectives" and "means" hardly advances the analysis. Joel S. Newman, DOCTORS, LAWYERS, AND THE UNABOMBER, 60 Mont. L. Rev. 67, 87-89 (1999). And the rules offer no guidance on how disputes between the client and the attorney are to be ultimately resolved. They instead merely urge that counsel discuss the issue with the client in an effort to persuade the client to assent to the planned strategy. *See* Sabelli & Leyton, 91 J. Crim. L. & Criminology at 217-18; Newman, 60 Mont. L. Rev. at 95-99 (positing that Kaczynski's attorneys could have sought to withdraw from case); H. Richard Uviller, CALLING THE SHOTS: THE ALLOCATION OF CHOICE BETWEEN THE ACCUSED AND COUNSEL IN THE DEFENSE OF A CRIMINAL CASE, 52 Rutgers L. Rev. 719, 771-74 (2000).

Contrary to the thinking reflected by the state court's majority, giving a criminal defendant who is represented by counsel the authority to dictate what defense strategy to present at trial will not allay conflicts, but create them. The defendant would have effective control over how to investigate his case, what evidence to present, how to cross-examine witnesses, the instructions to request, and many other decisions that have always been left to the considered strategic and tactical judgment of counsel. *See, e.g.*, *Strickland*, 466 U.S. at 691; *see also Sykes*, 433 U.S. at 93. Adoption of a rule that counsel's actions can be directed by the defendant in such a manner verges on the creation of a *right* to "hybrid" or "mixed" representation, a right this Court has not recognized. *See McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984).

The Court need look no further than the record in this case to see the difficulties presented by a rule that makes the choice of defense a fundamental right directly controlled by the defendant (and enforced by the trial judge), not a strategic choice left to counsel. To require, as the Delaware Supreme Court did (App. 104-06, 107-08), the trial judge to inquire and intervene into a dispute of this nature between a defendant and counsel is to make it a near certainty that the trial will be disrupted and the integrity of the proceedings eroded. *See Kaczynski*, 239 F.3d at 1116-18; Johnson, 93 Ky. L.J. at 76-77 (positing that defendants will choose to represent themselves). And the inquiry and intervention will clearly require trial judges to "delve[] too deeply into matters of trial

tactics, and in a fashion which may seriously undermine counsel's effectiveness and the [defendant]'s interests," *Commonwealth v. Cousin*, 888 A.2d 710, 724 (Pa. 2005) (Castille, J., concurring), thus risking judicial interference with the attorney-client relationship and defense strategy. Respondent's outbursts here generally reprised his disagreement with the GBMI strategy. His actual complaints, however, focused on matters such as the manner and scope of questioning and exposed his deluded understanding of the evidence against him, the procedural posture of the case, the applicable law and counsel's motives. (*See, e.g.*, App. 32-41; App. 178 – summarizing just some of respondent's misguided beliefs about his case). Because there was no clear answer as to where the ultimate decision-making authority lay, both the trial judge and the prosecutors were left "adrift." (App. 278-80).

D. The Sixth Amendment Gave Respondent No Right to Direct His Attorneys to Present an "Innocence-Based" Defense Irrespective of Counsel's Professional Judgment.

"The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. That right is denied when a defense attorney's performance falls below an objective standard of reasonableness and thereby prejudices the defense." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (per curiam) (citing *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Strickland*,

466 U.S. at 687). Counsel, however, enjoys "wide latitude in deciding how best to represent a client," *Gentry*, 540 U.S. at 5-6, and "strategic choices made" among "plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 689-90. Contesting guilt may not be a "plausible option[ ]," *id.* at 690, when the evidence is overwhelming, and "the Sixth Amendment does not require that counsel do what is impossible. . . . If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." *Cronic*, 466 U.S. at 656-57 & n.19. *See Knowles v. Mirzayance*, 129 S.Ct. 1411, 1422 (2009) ("Counsel also is not required to have a tactical reason – above and beyond a reasonable appraisal of a claim's dismal prospects for success – for recommending that a weak claim be dropped altogether.").

Thus, as the Court explained in *Nixon*, counsel confronted with overwhelming evidence of guilt on a charge can reasonably adopt a strategy of acknowledging the defendant's guilt in an effort to avoid undermining the credibility of arguments on other charges or on sentencing issues. 543 U.S. at 190-91. *See Gentry*, 540 U.S. at 9 ("By candidly acknowledging his client's shortcomings, counsel might . . . buil[d] credibility with the jury and persuade[ ] it to focus on the relevant issues in the case."). And as the Court acknowledged in *Nixon*, the nature of a capital murder prosecution and the life-or-death stakes involved in any capital prosecution can "reasonably [lead counsel] to focus on the trial's penalty phase,

[when] counsel's mission is to persuade the trier that his client's life should be spared." 543 U.S. at 191.

In its decision, the Delaware Supreme Court instead held that defense counsel, by eschewing respondent's directive to conduct only an "innocence-based" defense (i.e., "he didn't do it"), waived respondent's fundamental constitutional right to plead not guilty and the exercise of core trial rights. That waiver, in the court's view, could not occur "without the defendant's fully-informed and publicly acknowledged consent." (App. 83). The Delaware Supreme Court went on to hold that "the trial judge's obligation to ensure that [Cooke] receives a fair trial required the trial judge to instruct counsel not to pursue a verdict of guilty but mentally ill against [Cooke's] wishes." (App. 107-08).

That holding, however, misapprehends the decisions that are reserved to the defendant himself. When a criminal defendant exercises his right to self-representation, he holds complete control for himself. He exercises his "basic right to defend himself" and his right to do so "directly." *Faretta*, 422 U.S. at 817, 819-20. He then does so personally and may even personally conduct his own defense to his disadvantage. *Godinez v. Moran*, 509 U.S. 389, 399-400 (1993). When the criminal defendant is represented by counsel, however, the defendant cedes control over the conduct of his defense to counsel. The defendant then only retains the decisions "whether to plead guilty, waive a jury, testify in his or her own behalf, or

take an appeal." *Jones*, 463 U.S. at 751.[9] *See* Johnson, 93 Ky. L.J. at 66-71, 90-94, 112-14.

If the state court is now correct that when counsel concedes the defendant's responsibility for the *actus* elements of an offense, he or she effectively waives the defendant's right to trial, then the waiver must be knowing, voluntary and intelligent. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (waiver of a constitutional right must be "an intentional relinquishment or abandonment or a known right or privilege"). And, in turn, trial courts must ensure that is so, not simply allow the waiver to occur unless the defendant overtly objects to the court or whoever may hear him. *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (to waive any constitutional right to trial, the defendant must give a clear voluntary waiver of that right). The rule stemming from the Delaware Supreme Court's decision, however, finds no support

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[9] Of course, it is always permissible, but not necessary, under the Sixth Amendment for counsel to act in accordance with his client's restrictions on strategy. *See Schiriro v. Landrigan*, 550 U.S. 465, 475-80 (2007); *see, e.g., United States v. Wellington*, 417 F.3d 284, 289 (2nd Cir. 2005) (counsel's decision to stipulate to charges and waive jury trial not ineffective because defendant instructed counsel to pursue this strategy); *Wallace v. Davis*, 362 F.3d 914, 920 (7th Cir. 2004) (counsel's failure to present mitigating evidence not ineffective assistance because defendant repeatedly forbade counsel to do so); *King v. Kenna*, 266 F.3d 816, 824 (8th Cir. 2001) (counsel's failure to pursue evidence of defendant's incompetence not ineffective where defendant made clear that he did not want to be placed in a psychiatric institution).

in current practice, *see* CRIMINAL PROCEDURE § 11.6(c) at 798-800, or in decisions of this Court. *E.g.*, *Estelle v. Williams*, 425 U.S. 501, 508 n.3 (1976) ("The Court has not, however, engaged in this exacting analysis with respect to strategic and tactical decisions, even those with constitutional implications, by a counseled accused.").

Moreover, if the state court reached the right result in respondent's case, then the pronouncement to criminal defense counsel must be clear. Defense attorneys must be made aware that their knowledge of and experience with the professional standards for attorney performance which have been unanimously adopted by our legal institutions[10] ***must*** be jettisoned when they are instructed to do so by clients who, though legally competent, may be grossly uninformed,

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[10] *See, e.g.*, *Cronic*, 466 U.S. at 656-57 & n.19 ("the Sixth Amendment does not require that counsel do what is impossible. . . . If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade."); American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Comment 10.11 (Feb. 2003) (reprinted in 31 Hofstra L. Rev. 913, 1059 (2003)); *see id.* at Comment 10.10.1 (31 Hofstra L. Rev. at 1047-48) ("the theory of the trial must complement, support, and lay the groundwork for the theory of mitigation. Consistency is crucial because counsel risks losing credibility by making an unconvincing argument in the first phase that the defendant did not commit the crime, then attempting to show in the penalty phase why the client committed the crime.") (internal quotation marks and footnote omitted).

mentally ill, or, at the very least, sorely lacking in sound judgment.

There is no warrant for the Delaware Supreme Court's conclusion that counsel's concession of guilt in order to bolster arguments against a death sentence amounted to an infringement of respondent's fundamental right to enter a plea of not guilty and insist on trial (App. 85-87) or was otherwise an "entire[] fail[ure] to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. First, an actual plea of guilt is a waiver of all rights that inhere in a criminal trial, "a stipulation that no proof by the prosecution need be advanced," "itself a conviction." *Boykin v. Alabama*, 395 U.S. 238, 242-43 & n.4 (1969). That is not what occurred here; the GBMI strategy still required the prosecution to establish respondent's guilt beyond a reasonable doubt. Next, under a simplistic view that the only recognized goal of the defense in any criminal prosecution is to obtain an acquittal, concession of guilt by counsel may, in effect, end the meaningful adversarial contest. *See* Gary Goodpastor, THE TRIAL FOR LIFE: EFFECTIVE ASSISTANCE OF COUNSEL IN DEATH PENALTY CASES, 58 N.Y.U. L. Rev. 299, 328 (1983). Not so in capital cases.

The penalty phase of a capital murder trial "is in many respects a continuation of the trial on guilt or innocence of capital murder." *Monge v. California*, 524 U.S. 721, 732 (1998); *see also Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994) ("To render a defendant eligible for the death penalty in a homicide case . . . the trier of fact must convict the defendant of

murder and find an 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."); *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (statutory aggravator must be found by jury at penalty phase beyond a reasonable doubt because it is in all respects "the functional equivalent of an element" of capital murder). With these unique proceedings focused on the possible imposition of a death sentence, the constitutional dimension of "the Assistance of Counsel for [one's] defence" also necessarily expands.[11] In turn, any examination that looks only to the efforts to seek a not guilty verdict is fundamentally flawed. *See Bell v. Cone*, 535 U.S. 685, 696-97 (2002) ("When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete," rather than a "fail[ure] to do so at specific points."). And the state court's consideration of only the proceedings before the jury in deciding that defense counsel had failed to test the prosecution's case in a meaningful way (App. 86-87, 102) is surely too myopic a view of counsel's performance; if nothing

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[11] In fact, because the evidence of guilt against a capital defendant often is overwhelming, "attorneys familiar with capital cases view the penalty trial as the probable focal point of the capital case." Welsh S. White, EFFECTIVE ASSISTANCE OF COUNSEL IN CAPITAL CASES: THE EVOLVING STANDARD OF CARE, 1993 U. Ill. L. Rev. 323, 325 (1993). *See also* Goodpastor, 58 N.Y.U. L. Rev. at 331 ("[B]ecause the strength of the evidence of guilt, the penalty phase trial is the only real trial the defendant will receive.").

else, the state court's approach overlooks the substantial pre-trial work done in respondent's case.

II. An Unresolved Disagreement with Counsel Over Defense Strategy Is Not a "Conflict of Interest" Violative of the Sixth Amendment.

Respondent wanted counsel and never sought to waive his right to legal representation. Respondent did not seek to dismiss counsel and proceed *pro se*,[12] which would have required the court to conduct a searching inquiry into the request. *See Johnson v. Zerbst*, 304 U.S. at 465; *Faretta*, *supra*. Neither did he request the appointment of new counsel. *See*, *e.g.*, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006). His counsel never expressed an unwillingness or disinterest in putting forth their best efforts on respondent's behalf. And, they never sought permission to withdraw from representation. *See*, *e.g.*, *Bultron v. State*, 897 A.2d 758 (Del. 2006). The sticking point here was that respondent wanted the assigned defense team, which had worked so diligently for him, to do what he wished: to wit, discard the plausible GBMI defense in favor of the wholly implausible defense of actual innocence. (App. 135 n.184 – "Cooke's

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[12] Despite his other protestations, not until respondent testified on the last day of the defense case did he ever claim to have "got[ten] rid of these public defenders . . . [and] fired them a long time ago." (App. 67).

irrational and unreasonable strategy to pursue innocence").

The right to counsel does not guarantee: "a right to counsel with whom the accused has a 'meaningful attorney-client relationship,'" *Morris v. Slappy*, 461 U.S. 1, 3-4 (1983) (citations omitted); "that a defendant will inexorably be represented by the lawyer whom he prefers," *Wheat v. United States*, 486 U.S. 153, 159 (1988); or that counsel "will take every position and make every argument that the client requests." *United States v. Boigegrain*, 155 F.3d 1181, 1187 (10th Cir. 1998) (citing *United States v. Dawes*, 874 F.2d 746, 748 (10th Cir. 1989)). And, while "[a]n attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy," *Nixon*, 543 U.S. at 187, it is counsel who has the ultimate responsibility for determining "what arguments to pursue," and "what defenses to develop." *Hill*, 528 U.S. at 115 (citing *Jones*, 463 U.S. at 751); *Sykes*, 433 U.S. at 93 n.1 (Burger, C.J., concurring). As observed by the dissent below, "[a] defendant's choice to plead not guilty may result in either asserting innocence or challenging the State to prove guilt beyond a reasonable doubt." (App. 127). Respondent wanted the former; his counsel knew they could only effectively provide the latter. They acted in accordance with that well-informed knowledge and with an eye toward the ultimate goal of avoiding their client's execution.

This "conflict" did not implicate the Sixth Amendment. To do so, unwanted actions must be

"undertaken due to the attorney's other loyalties or interests." *United States v. Stantini*, 85 F.3d 9, 16 (2nd Cir. 1996); *United States v. Acty*, 77 F.3d 1054, 1056-57 (8th Cir. 1996). It is insufficient merely that the lawyer's and client's *beliefs* diverge with respect to a material factual or legal issue or to a course of action: the actual *interests* of the attorney and the defendant must diverge. *See Cuyler v. Sullivan*, 446 U.S. 335, 356 n.3 (1980); *Mickens v. Taylor*, 535 U.S. 162, 172 n.5 (2002) ("[W]e have used 'conflict of interest' to mean a division of loyalties that affected counsel's performance"). Good faith disagreement over which defense strategy to employ simply is not a "conflict of interest." *See* CRIMINAL PROCEDURE § 11.9(c) at 896 ("To find an actual conflict, a court must determine that the defense counsel is subject to an obligation or unique personal interest which, if followed, would lead counsel to adopt a strategy other than that most favorable to the defendant."). To call any disagreement over strategy a "conflict of interest" adds to the growing confusion among the lower courts as to whether this situation presents a constitutionally intolerable conflict. *E.g.*, *People v. Bergerud*, 203 P.3d at 586 (disagreement over innocence-based strategy labeled a "conflict of interest"); *State v. Cross*, 132 P.3d 80, 92-93 (Wash. 2006) (conflict over whether to pursue insanity defense "not the same thing as a conflict of interest"). Moreover, the state court's decision is singular in its holding that a trial court must resolve such a disagreement by forcing counsel to aid his client in "legal suicide." (App. 65; App. 107-08 – "the trial judge [was required] to

instruct counsel not to pursue a verdict of guilty but mentally ill against [Cooke's] wishes" and instead put forth an "I didn't do anything . . . I didn't kill this person" defense).

This Court should make clear that, contrary to the holding of the Delaware Supreme Court, an unreconciled disagreement constitutes a violation of the Sixth Amendment *only* where there is a complete bilateral breakdown in communication between the attorney and client, *and* that breakdown prevents effective assistance of counsel. *Mickens*, *supra*; *Stenson v. Lambert*, 504 F.3d 873, 886 (9th Cir. 2007). "Disagreements over strategic or tactical decisions do not rise to [the] level of a complete breakdown in communication," *Stenson*, 504 F.3d at 886, and are tolerable when there is no doubt but that the defendant received the level of effective representation guaranteed him by the Sixth Amendment. Adoption of the contrary rule and remedy suggested by the state supreme court here would: (1) place the existence of a constitutional violation in the complete control of a criminal defendant who can create a "conflict" by unilaterally, irrationally and vocally "checking out" of the attorney-client relationship; (2) force competent attorneys to present incompetent defenses that invite (a) spurious ineffective assistance of counsel claims and (b) unwarranted damage to their professional reputations; and (3) increase the difficulty trial courts have finding competent representation for indigent defendants. *See Strickland*, 466 U.S. at 690 (Court

rejects constitutional standard that will "discourage the acceptance of assigned cases").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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977 A.2d 803 (Del. 2009)

Supreme Court of Delaware.
James **COOKE**, Defendant Below-Appellant,
v.
STATE of Delaware, Plaintiff Below-Appellee.
Nos. 289 & 324, 2007.

Submitted: April 8, 2009.
Decided: July 21, 2009.

Court Below: Superior Court of the State of Delaware, in and for New Castle County, ID No. 0506005981.

Upon appeal from the Superior Court. **REVERSED AND REMANDED.**

Jennifer Kate Aronson, Esquire (argued) and Joseph A. Gabay, Esquire (argued), Wilmington, Delaware, for appellant.

Paul R. Wallace, Esquire (argued), Loren C. Meyers, Esquire, Steven P. Wood, Esquire, Gregory E. Smith, Esquire, Danielle J. Brennan, Esquire of the Department of Justice, Wilmington, Delaware, for appellee.

Before STEELE, Chief Justice, HOLLAND, BERGER, JACOBS, and RIDGELY, Justices, constituting the Court en Banc.

RIDGELY, Justice, for the Majority.

In this capital case, we address whether defense counsel may introduce evidence incriminating their client at the guilt/innocence phase and then argue that a competent defendant is "guilty but mentally ill" of the crimes charged when the defendant

expressly objects to this strategy, asserts his factual innocence, denies mental illness, and so testifies before the jury. We also address whether the trial judge, in these extraordinary circumstances, may choose not to intervene when the conflict between defense counsel and the defendant over the objectives of the representation so plainly appears and the defendant testifies that he has "fired" his attorneys and "I'm defending my own self." We conclude that defense counsel's strategy infringed upon the defendant's personal and fundamental constitutional rights to plead not guilty, to testify in his own defense, and to have the contested issue of guilt beyond a reasonable doubt decided by an impartial jury. Defense counsel's conduct in this case, and the trial court's refusal to intervene and provide a remedy, so undermined the proper functioning of the adversarial process contemplated by the Sixth Amendment and the Due Process Clause that the trial cannot be relied upon as having produced a just result. Accordingly, we must reverse the judgment of the Superior Court and remand for a new trial.

I. The Issues on Appeal.

Defendant-Appellant James Cooke appeals from his Superior Court convictions of eleven charges, including rape in the first degree, burglary in the first degree, arson in the first degree, and two counts of murder in the first degree, which resulted in a sentence

of death.[1] Nine claims of error are before us. First, Cooke claims that the trial court violated his right to due process and right to counsel guaranteed by the United States and Delaware Constitutions when it permitted defense counsel to argue that Cooke was "guilty but mentally ill" over his express objection and despite his plea of "not guilty." Second, he contends that the court violated his Sixth Amendment right by failing to inquire sufficiently and timely into the actual conflict of interest and/or irreconcilable conflict that existed between Cooke and his trial counsel. Third, he argues that it was plain error for the court to admit psychiatric evidence and instruct the jury on the alternative verdict of "guilty but mentally ill" in the absence of an affirmative defense of "not guilty by reason of insanity." Fourth, he claims that the court erred in finding that antisocial personality disorder is "exempted" as a mental illness that serves as a basis for a finding of "guilty but mentally ill." Fifth, he urges that the court's jury instruction on "guilty but mentally ill" failed to require that the State prove by a preponderance of the evidence that Cooke suffered from antisocial personality disorder. Sixth, Cooke contends that he was denied a fair penalty hearing as a result of prosecutorial misconduct. Seventh, he argues that Title 11, Section 4209 of the Delaware Code is

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[1] Cooke was also convicted of reckless endangering in the first degree, robbery in the second degree, two counts of burglary in the second degree, and two counts of misdemeanor theft.

unconstitutional, because it is overly inclusive and does not require a finding by the jury that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. Eighth, he claims that the court erred in denying his motion to suppress evidence related to the search of his residence. Ninth, he claims that his death sentence is not proportionate to the penalty imposed in similar cases.

We find merit to Cooke's first and second claims under the Sixth Amendment. His remaining claims are therefore moot, with the exception of his eighth claim, which we find lacks merit.

II. Facts and Procedural History

A. *The Crimes: Harmon, Cuadra, and Bonistall.*

On April 26, 2005, at approximately 11:30 p.m., Cheryl Harmon returned to her apartment in the Towne Court Apartments in Newark. When she entered her apartment, she noticed bright red writing on her front living room wall and noted a strong odor of fingernail polish. Written on the living room wall was the statement "We'll be back." The statement "I what [sic] my drug money" was written on the bathroom wall, and the statement "Stop messing with my men" was written on the bedroom door. A living room window, previously locked, had been pried open to gain entry. Various items were also missing from her apartment, including two rings engraved with Harmon's name. Harmon called the police, who arrived

soon after. However, there were no immediate suspects.

On April 29, 2005, Amalia Cuadra awoke in her Newark home to someone standing in her bedroom shining a light in her face. Thinking it was her roommate, Cuadra called out: "Carolina." In response she heard: "Shut the fuck up or I'll kill you; I know you have money." Cuadra, who was wearing only a t-shirt and underwear, got out of bed, wrapped herself in a blanket, and gave the person $45 from her wallet. She was also able to press 911 on her cell phone, but did not press "send." The person then demanded: "Give me your fucking credit cards or I'll kill you," and then "Take off your fucking clothes or I'll kill you." Cuadra screamed "Carolina" three times. As she screamed, the person apparently also saw the cell phone screen displaying "911" and fled, taking several items, including Cuadra's iPod, a backpack with her name tag, her credit card, and diet pills in a tin container. After the man left, Cuadra called 911. She described the intruder as a light skinned black male with bumps or freckles on his face, wearing a gray hooded sweatshirt, a hat, gloves, and light blue pants. Again, however, there were no immediate suspects.

On May 1, 2005, at about 1 a.m., Lindsey Bonistall, a twenty-year-old student at the University of Delaware, returned to her apartment in the Towne Court Apartments. Shortly thereafter, an intruder burglarized her apartment, entering through a sliding door that led from a balcony into her living room. The

intruder eventually encountered Bonistall and attacked her in her bedroom. He beat Bonistall, striking her on the head at least twice above her left eye and on her chin. The intruder then used an iron cord to bind Bonistall's hands behind her back. Using her own t-shirts, the intruder further bound his victim. One t-shirt was knotted and shoved forcibly into her mouth as a gag. It was so tight that teeth marks were still visible when the gag was introduced at trial almost two years later. The intruder then knotted another t-shirt, which he used as a ligature to strangle Bonistall. Bonistall suffered severe bruising on her chest, consistent with someone kneeling on her, which likely occurred when the intruder was tightening the t-shirt-turned-noose. The intruder then raped Bonistall and strangled her to death.

It is likely that Bonistall was killed in her bed. Then, in an apparent attempt to eliminate evidence of his crime, after raping and strangling her to death, the intruder took a bottle of bleach from Bonistall's closet and doused her dead body with bleach while she was still in her bed. He then dragged Bonistall's still bound body to the bathroom, placed her facedown in the bathtub, piled pillows, a wicker basket, and a guitar on top of Bonistall's body, and lit a fire. Although portions of her body were badly burned, Bonistall was dead before the fire started.

Continuing his attempt to conceal the true nature of his crime, at some point while he was still in the apartment, but before starting the fire, the intruder wrote on the walls and countertops of Bonistall's

apartment in blue marker. Written on the interior surface of the front door and on a closet door directly across from it, was the statement "KKK." The statements "More Bodies Are going to be turn in [sic] up Dead," "We Want Are [sic] weed back," and "Give us Are [sic] drugs back" were written on the living room wall, and the statements "WHITE Power" and "KKK" appeared in the kitchen.

At approximately 3 a.m., shortly after Bonistall was murdered, the fire the intruder started in the bathtub awakened local residents, who called the local fire department. Late that morning, the fire marshal investigating the scene discovered Bonistall's body lying face-down in the melted, burnt bathtub. Portions of the walls above the bathtub had collapsed around her body as a result of the fire, and the tub had to be broken apart in order for Bonistall's body to be removed.

B. *The Investigation.*

Early in the morning of April 29, two days before Bonistall was murdered, Cooke returned to his residence at 9 Lincoln Drive in Newark, where he lived with his girlfriend, Rochelle Campbell.[2] Campbell noticed a panty liner and a backpack which she did not recognize. The backpack contained an iPod, a

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[2] At the time, Campbell had had three children together and was pregnant and due in June with the fourth. She had known Cooke for about ten years.

tin-looking container, and a name tag with a "Spanish" name on it. She asked Cooke where he got the backpack and he said he had taken it from some college students who had gotten into a car accident outside the house and left it on the curb. He then showed Campbell the credit cards, discussed trying to use them at a nearby ATM, and left.

On May 2, JP Morgan Chase determined that someone had attempted to use Cuadra's stolen credit card at an ATM located at 211 Elkton Road at 4:19 a.m. on April 29. The ATM is approximately a half mile from Cooke's residence. From the ATM surveillance tape, police recovered still photographs showing a man at the ATM wearing a grey hooded sweatshirt and wool gloves. Within a day or two, Cuadra was shown one of the photographs from the ATM and was "pretty sure" that the man depicted was the intruder in her bedroom. From Cuadra's description, police created a composite sketch, which they published in a "wanted" poster. Police also created a second "wanted" poster from the ATM photographs. Cooke was identified as the man in the photos by co-workers, neighbors, and Campbell.

Following Bonistall's murder, Cooke made three phone calls to the Newark 911 call center, during which he gave a false name and attempted to disguise his voice. The first call occurred on May 2, the day after the murder; he then called twice on May 7, at one point speaking with Detective Andrew Rubin, the chief homicide investigator. Cooke claimed to have knowledge of Bonistall's murder and used the names

of the home invasion victims, Harmon and Cuadra. He gave the police details about the three crimes that had not been previously released to the public, including a specific pronunciation of Cuadra's roommate's name, that "KKK" had been written on the walls of Bonistall's apartment, and that Bonistall had been bound. Campbell testified at trial that the voice in the calls was Cooke's.

Police performed a handwriting analysis on the writing on the walls in both Bonistall's and Harmon's apartments, which confirmed that Cooke could have written all the statements. Police also conducted forensic testing at the crime scenes. Analysis on scrapings recovered from Bonistall's fingernails revealed a mixture of Bonistall's and Cooke's DNA. Analysis of DNA recovered from Bonistall's vaginal area was also consistent with Cooke's DNA profile.

C. *The Trial.*

Cooke was arrested in Delaware on June 8, 2005, and indicted by a grand jury for murder in the first degree (Bonistall), rape in the first degree (Bonistall), felony murder in the first degree (murder during the rape of Bonistall), burglary in the first degree (Bonistall's apartment), arson in the first degree (Bonistall's apartment), reckless endangering in the first degree (the fire in Bonistall's apartment), burglary in the second degree (Cuadra's apartment); robbery in the second degree (Cuadra), misdemeanor theft (Cuadra), burglary in the second degree (Harmon's

apartment), and misdemeanor theft (Harmon). The State sought the death penalty on each of the murder counts.[3] On August 9, Cooke entered a not guilty plea and demanded a jury trial. Cooke was represented by attorneys from the Office of the Public Defender. Trial was scheduled to begin February 2, 2007.

1. *Defense counsel chooses to pursue a verdict of guilty but mentally ill.*

Defense counsel began considering seeking a verdict of "guilty but mentally ill" as early as September 2005. In October 2005, they informed the trial judge and the prosecution that the defense expected to pursue the verdict. Defense counsel were aware that Cooke did not agree with this decision at least as early as October 2006, when they gave Cooke a memorandum explaining that they believed the decision to pursue a guilty but mentally ill verdict was for counsel, and not for the defendant, to make. Cooke asserted that he was innocent and not mentally ill.

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[3] The State relied on the aggravating factor in Title 11, section 4209(e)(1)j, which allows for the death penalty if "[t]he murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of rape, unlawful sexual intercourse, arson, kidnapping, robbery, sodomy or burglary."

2. *Pre-trial conferences indicate a rift between Cooke and trial counsel.*

Defense counsel first informed the trial judge that Cooke did not agree with their decision to seek a guilty but mentally ill verdict during an office conference to discuss jury selection and scheduling matters on January 19, 2007. At the end of the conference, when they finished discussing jury selection and scheduling matters, the trial judge asked whether the State or defense had any other issues they wished to raise. Defense counsel answered in the affirmative and explained that Cooke did not agree with their decision about how to best defend the case. Defense counsel wanted to assert that Cooke was guilty but mentally ill, while Cooke wished to maintain his factual innocence and did not want his counsel to present evidence that he was mentally ill. Defense counsel explained the issue as follows:

> Well, there's probably something we should bring up and Mr. Cooke and co-counsel and I have talked about it at length.
>
> * * *
>
> It may come to a head, it may not. Mr. Cooke has one idea about how to defend this case; his counsel has a different idea. And in counsel's view, Mr. Cooke's intended course of defense has little chance for success and will likely increase his chances for conviction and likely a death sentence. We have talked at length, counsel and Mr. Cooke, and to date we have essentially agreed to disagree; and I

have written him at length and explained to him that in counsel's view, based on the case law in Delaware, it is his lawyer's discretion whether to present a particular defense – well, I should start again. I have explained, and I'll submit at some point what I have – or at least a summary of what I have written to Mr. Cooke explaining that if the decision is the purpose of the litigation then the decision rests with Mr. Cooke about what to do. However, if the decision pertains to trial tactics and strategy, it is his counsel's decision what to do. That's with respect to the first phase of the case. Assuming we're facing then the second phase of a case, a penalty phase, I have written to Mr. Cooke and given him my opinion that based on the *Ashley* opinion of Judge Carpenter that the presentation of a mitigation case is in the discretion of trial counsel. Although there have been circumstances where defendant's decision to waive mitigation evidence has been accepted.

* * *

[Co-counsel] and I have the view that we can't present a claim of guilty but mentally ill without having to renounce innocence; that Mr. Cooke can maintain his innocence, as he may do if he chooses to testify, yet we will be able to present, on his behalf, a claim of guilty but mentally ill. And so there is going to be, I think, at some point probably before we begin the evidence and make opening statements where we are going to need to

> go on the record and hash this out on the record, and go forward from there.
>
> * * *
>
> So that's where we are right now with respect to Mr. Cooke and what's likely to be forthcoming.

Although this was the first time the trial judge learned about the disagreement between Cooke and his counsel, it is evident from the transcript that the State was aware of the disagreement prior to the conference. First, earlier in the conference, the State argued to the trial judge that if the defense was to decide prior to opening arguments that it intended to seek a guilty but mentally ill verdict, then the defense must inform the State pre-trial so that the State could draft its opening arguments accordingly. Defense counsel declined to comment at that time.[4]

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[4] The discussion went as follows:

> **The State:** So I suppose I am asking if Your Honor agrees with that analysis for the defense to let us know at some point what it is going to do in its opening so we can proceed accordingly.
>
> **The Court:** Interesting question. Do you care to respond in any way at this point? I'm not requiring you to necessarily, but whatever you want to say.
>
> **Defense Counsel:** No thank you at this moment. I don't care to respond at this moment, given that option. For once I'm going to shut my mouth.
>
> **The Court:** Okay. We will take this up in connection with the preliminary instructions at the latest before [] we start the trial. . . . That's not saying necessarily

(Continued on following page)

Second, after defense counsel told the trial judge about the disagreement, the prosecutor stated that he was grateful that defense counsel had raised the issue and explained that he had already discussed the issue with the State's Appellate Division. The prosecutor summarized the issue as follows: "[I]f the defendant maintains his factual innocence, can counsel, nonetheless, argue that he is guilty of the charged offense but mentally ill?"

The trial judge shared his concern by stating: "I don't know how you can argue something that has the word 'guilty' in it when the defendant doesn't want you to, because it's guilty as charged, not guilty of the lesser-included offense."

It is also apparent from the transcript that Cooke had disclosed his disagreement with counsel during his interviews with psychiatrists. During an interview with Dr. Alvin Turner, a psychologist who later testified for the defense, Cooke admitted and also denied, the crimes, but repeatedly stated that he did not agree with the mental illness evidence his counsel wanted to present at trial because he was not guilty and not mentally ill. The prosecutor, who had read the doctors' reports produced during discovery, explained to the trial judge that, "according to Dr. Turner's report, the defendant admitted murdering Ms. Bonistall and then denied it. What he told Dr.

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it will be resolved by that point, but at least from the point of view of opening.

Mechanick is that he never told Dr. Turner he killed Lindsey Bonistall . . . but this mentally ill stuff is all garbage and he's sane."

Defense counsel knew that Cooke wanted to maintain his factual innocence. Defense counsel explained that they believed that Cooke was "certainly entitled under the law to testify in any way he deems appropriate" and that Cooke would likely testify that "he had consensual sex with Lindsey Bonistall, he left and after that she must have been murdered by somebody else. I know nothing about it." But, defense counsel also explained they felt that they could not in good faith make the same argument. In their view, "that does not preclude counsel from pursuing a claim of guilty but mentally ill." Finally, defense counsel explained that they were bringing up the issue at the pre-trial conference because they thought that the trial judge needed to engage in a colloquy with Cooke and address the disagreement on the record prior to trial. Defense counsel was concerned that failure to address the disagreement prior to trial might result in "some kind of disastrous happening during trial," such as an outburst by Cooke.[5]

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[5] The discussion went as follows:

Defense Counsel: "I think we need to address it legally before opening statements and submit something in writing to the Court and put Mr. Cooke before the Court and address it on the record. I think doing anything other than that, we're inviting some kind of disastrous happening during trial."

(Continued on following page)

The disagreement between Cooke and his counsel was brought to the trial judge's attention for a second time on January 22, 2007, during an office conference the day before jury selection was to begin. Defense counsel gave the trial judge and the State a copy of a memorandum that they had given to Cooke in October 2006. The memorandum discussed the disagreement between Cooke and his counsel and whether his counsel could present evidence to support a guilty but mentally ill verdict despite Cooke's objection.[6] The trial judge had not yet researched the issue, but noted that the law was not clear on how to resolve the disagreement. He also noted that the unsettled state of the law was probably the reason why defense counsel had asked him to engage in a colloquy with Cooke before the trial began.

Defense counsel said they believed that Cooke had a mental illness and that his decision to waive a defense of mental illness should be "very carefully

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The Court: Like an outburst or something of that nature, possibly?

Defense Counsel: Yeah.

[6] Defense counsel explained:

It's really the defense position that – and we advised Mr. Cooke of this – it is his counsel's position that counsel can present both a defense in the guilt/not guilt phase of the trial and mitigation evidence in the penalty phase, should there be a penalty phase, and this is an effort to outline the defense position on why we should be able to do that, notwithstanding his desire otherwise.

scrutinized." The prosecutor pointed out that all of the psychiatric/psychological experts had determined that Cooke was competent to stand trial, meaning that he could make legal decisions. The prosecutor explained that if defense counsel decided to introduce evidence to support a guilty but mentally ill verdict, despite Cooke's objections, then defense counsel would be suggesting to the jury that Cooke's preferred defense of innocence was not valid. The prosecutor said that "it would get particularly knotty, I suppose, if the defendant were to testify and say, 'I did not kill Lindsey Bonistall,' and defense were to then present psychiatric or psychological testimony from Dr. Turner, which, among other things, includes the defendant's admission that he did kill Lindsey Bonistall."

These exchanges in the record demonstrate that the trial judge was made aware that Cooke wanted to maintain his innocence but that his counsel, not the State, was considering admitting evidence that Cooke confessed to the crime. The trial judge concluded that he would probably hold a colloquy with Cooke after the jury was selected and before the start of evidence. The State requested that the trial judge hold the colloquy before opening statements. The trial judge did not make a decision about when exactly he would hold the colloquy.

3. *Jury Selection.*

On January 24, 2007, after the morning session of voir dire had concluded, the trial judge asked to talk to counsel outside the presence of Cooke. The trial judge wanted to raise the issue of whether Cooke needed to enter a plea of guilty to seek a guilty but mentally ill verdict. Defense counsel stated that they believed Cooke did not need to enter a plea of guilty to pursue a guilty but mentally ill verdict. The State agreed that the statute governing the guilty but mentally ill verdict requires the State to prove Cooke's guilt beyond a reasonable doubt and therefore does not require a guilty plea.

The State noted, however, that the relevant issue in Cooke's case "was more whether a defendant, who insists upon a verdict of 'not guilty' can have that choice in any way overridden by counsel." The trial judge acknowledged that he needed to address the issue. He noted that, even if he were to decide that defense counsel had to present evidence at trial to support the objective that Cooke choose – *i.e.*, that Cooke was not guilty – and could not present evidence to support a guilty but mentally ill verdict, the inquiry would not end there because the issue would come up again in the penalty phase, if there was one. The trial judge stated: "I'm just saying that the tangled web we're weaving continues to weave." The discussion concluded because the trial judge did not want to have argument on the issue at that time; he was simply pointing out potential issues for the parties to consider.

On January 26, after the afternoon session of voir dire concluded, the State requested that the trial judge engage in a colloquy with Cooke as soon as possible, rather than delay addressing the issue of whether defense counsel could pursue a guilty but mentally ill verdict despite Cooke's objections. The State stated that it was considering certifying a question to this Court for an opinion as to whether Cooke or his counsel had the right to decide whether or not to pursue a verdict of guilty but mentally ill as opposed to not guilty; and further suggested that it might seek a writ of mandamus to forbid the trial judge from permitting defense counsel to present evidence to support a guilty but mentally ill verdict over Cooke's objections. The trial judge stated that he had not yet decided whether it would be appropriate to have a colloquy with Cooke before trial to discuss the disagreement.

The next day, the State sent defense counsel an email discussing the issue of who controls the defense's objective in the case. Defense counsel responded on January 28. Defense counsel also emailed the trial judge and stated that they objected to the trial judge holding a colloquy with Cooke about the disagreement, even though defense counsel originally had requested the colloquy.

On January 29, before voir dire began for the morning, the State renewed its request for the trial judge to engage in a colloquy with Cooke to determine whether or not Cooke still disagreed with his attorneys about their decision to pursue a guilty but

mentally ill verdict and, if he still disagreed, whether or not Cooke's attorneys could pursue a guilty but mentally ill verdict despite Cooke's objections. The trial judge declined to decide whether or not to hold a colloquy. He wanted to continue with jury selection. The State asked whether a colloquy was "still a possibility," "at some point" and the trial judge said: "Maybe."

On January 30, the State moved *in limine* for an order to preclude defense counsel from presenting evidence to support a guilty but mentally ill verdict or any other evidence of mental illness unless either: (1) defense counsel informed the trial judge that there was no longer a dispute with Cooke about whether to pursue the verdict and that Cooke agreed with the presentation of evidence to support the verdict, or (2) the trial judge engaged in a colloquy with Cooke and determined that Cooke agreed with his counsel's decision to seek a guilty but mentally ill verdict. In an email to the trial judge notifying him of the State's intent to make the motion, the prosecutor explained that "the ultimate choice of whether or not to pursue a guilty but mentally ill verdict is the defendant's to make, and that counsel cannot override that choice when (as is the case here) it is expressly communicated to them by a competent client." While making the motion, the prosecutor stated: "[W]e have a client who is communicative with counsel and has expressly said, after getting the best possible legal advice from two esteemed members of the defense bar, that he does not want to present a guilty but mentally ill

defense." In addition, "the defendant's confession, if it be such, only comes into evidence through the guilty but mentally ill defense expert witness, Dr. Turner." Therefore, the prosecutor explained that the issue needed to be fleshed out before opening statements, where defense counsel would likely mention Cooke's mental illness.

Defense counsel disagreed with the State's position. They explained that they only brought the dispute to the trial court's attention because defense counsel wanted to avoid "any mid-trial surprises." Defense counsel stated: "It was not brought as an invitation to the State to attempt to have this Court dictate to counsel what counsel can say to the jury in opening statements." Defense counsel was concerned that if the trial judge granted the State's motion, it would have the result that "a man that counsel believes has mental illness [would make] a decision about whether to present evidence of that mental illness." Further, defense counsel noted that Cooke was not proceeding *pro se*. He wanted to have lawyers represent him. Defense counsel stated:

> We're not conceding guilt here. We're going to challenge every shred of evidence, if appropriate, if we think it's appropriate in helping Mr. Cooke's defense. We're going to fight for him in that respect. We're not conceding guilt, but also, we're not being unrealistic. We're going to put the State to its proof. And we're going to present evidence of Mr. Cooke's mental illness.

> And at this juncture, to tell his lawyers, "You can't say that," to me looks like a guaranteed reversal. Now, I'm not really an appellate lawyer, but I've been doing this business a long time. I have never, from when I was a prosecutor or a defense lawyer, ever seen a situation where the judge is telling the defense lawyer, "Before you make your opening statement, you can't go there." You can't tell the jury what you expect to prove because you and your client aren't in "100 percent agreement." And I can tell you that [co-counsel] and I have made some progress in speaking with Mr. Cooke and that's all I'll say.
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> * * *
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> [W]e have every expectation to believe that we will be presenting evidence of guilty but mentally ill, and Mr. Cooke may or may not be on board with us by the time we get there, but that doesn't mean we shouldn't get to tell the jury about it.
>
> * * *
>
> And I'm going to tell this jury that we're going to present evidence of mental illness. I'm going to tell them it's up to them to decide whether the State has proven guilt.

At this point, Cooke said, "I've got to speak to the Judge." The record does not reflect that the trial judge or Cooke's counsel acknowledged Cooke's statement. Instead, the discussion between the trial judge,

the State and defense counsel continued. The prosecutor again noted his reservations about permitting Cooke's counsel to proceed with conceding guilt when Cooke claimed factual innocence. The prosecutor said:

> So what the defense is saying is they want to present evidence of guilt in contravention to their client's wishes and in contravention in part to his testimony and desire to pursue a defense of factual innocence. [T]he best possible result of all of this would be to have your Honor engage in a colloquy or to have [defense counsel] say, "We've talked to James Cooke, he's changed his mind. He wants to go with a guilty but mentally ill defense."

The trial judge expressed three reservations about engaging in a colloquy with Cooke. First, he explained that defense counsel were no longer requesting a colloquy (even though they had originally requested it), and instead, were opposed to the trial judge engaging in a colloquy. Second, the trial judge was uncertain as to the ground rules for conducting such a colloquy, because there was no guiding case law, and he thought that an *in camera* colloquy with Cooke would be "totally inappropriate." Third, the trial judge acts as the ultimate sentencing authority and can only hear evidence that is presented to the jury, because the trial judge must make his decision based only on the evidence heard by the jury.

In addition, the trial judge thought he did not need to address the disagreement between Cooke and his counsel prior to opening statements, because the

defense is not required to make an opening statement prior to the State's case-in-chief and can instead reserve the right to make an opening statement after the close of the State's case. Further, the State was not permitted to mention the potential presentation of evidence by the defense to support a guilty but mentally ill verdict because, in the State's opening statement, it is only permitted to address the evidence it will present in its case-in-chief – to mention the guilty but mentally ill evidence would constitute an argument and be inappropriate. The trial judge concluded that he was not going to do anything with regard to the dispute and would not hold a colloquy for the time being.

On January 31, the State informed the trial judge via fax that it would seek a writ of mandamus from this Court, asking this Court: (1) to review the trial judge's decision to deny the State's motion *in limine* to engage in a colloquy with Cooke or forbid defense counsel from seeking a guilty but mentally ill verdict and (2) to answer the question of whether Cooke's attorneys could seek such a verdict despite Cooke's objections.[7]

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[7] In criminal cases, only final judgments may be appealed to this Court. DEL. CONST. art. IV, § 11; *Stevenson v. State*, 840 A.2d 594 (Del.2003). Even so, the State asked this Court to determine pre-trial whether, "in the event of an irreconcilable disagreement between defense counsel and the defendant about a decision to seek a verdict of guilty but mentally ill, . . . the defendant's wishes prevail," and, if so, to direct the Superior Court to preclude Cooke's defense attorneys from presenting

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On February 1, the day before trial was to commence, the trial judge met with the parties and determined that they would proceed to trial while the writ was pending. The trial judge also reminded defense counsel to advise Cooke "that it is not in his interest to be demonstrative during the trial while the jury's in the courtroom." The trial judge was referring to Cooke's statement, "I've got to speak to the Judge," made during the January 30 discussion about whether Cooke's attorneys could present evidence to support a guilty but mentally ill verdict if Cooke objected and maintained his factual innocence.[8] Defense counsel said they had already advised Cooke that "his best interests are served by behaving

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evidence that would support a verdict of guilty but mentally ill. *In re Petition of State for a Writ of Mandamus,* 918 A.2d 1151, 1152-53, 1155 (Del.2007). We declined to reach the substantive issues of the petition, determining, instead, that "a writ of mandamus proceeding [was] not the proper procedural context in which to decide the issue." *Id.* at 1153. A writ of mandamus is an extraordinary remedy, which is only available when the petitioner has established a clear and indisputable right to performance of the duty in question, no other adequate legal remedy is available, and the trial court has arbitrarily failed or refused to perform its duty. *In re Bordley's Petition for a Writ of Mandamus,* 545 A.2d 619, 620 (Del.1988) (per curiam).

[8] The trial judge said:

> I don't intend to say anything at this point directly, but I would assume knowing the two of you and it encompasses a lot of good things that you'll probably, especially after Tuesday [January 30, 2007], have advised Mr. Cooke that it is not in his interest to be demonstrative during the trial while the jury's in the courtroom.

appropriately" after he made the statement in court and they would advise him again before trial and continue to so advise him.

4. *State's Case-in-Chief.*

Trial began on February 2, 2007. During the preliminary instructions to the jury, the trial judge explained that "[i]t is improper for an attorney to state an opinion as to . . . whether the defendant is guilty or not guilty." The trial judge also explained that "[w]hat an attorney thinks or believes about the evidence or the credibility of a witness in a case is absolutely irrelevant and you are instructed to disregard any personal opinion or belief which an attorney offers during opening or closing statements or any other time during the course of the trial." The prosecutor then gave his opening statement.

When the prosecutor was finished and the trial judge excused the jury for a recess, defense counsel asked to approach the bench and told the trial judge that, during the prosecutor's opening remarks, "Mr. Cooke handed [defense counsel] a note that indicates that he would like to talk to the Judge, please." The trial judge asked defense counsel to ask Cooke what he wanted to speak to the judge about and defense counsel left the courtroom to meet with Cooke in the conference room behind the courtroom. Before they left, defense counsel said they thought that Cooke might want to enter a plea of guilty. But, when defense counsel returned from the meeting with Cooke,

they explained that Cooke did not want to enter a plea of guilty. Cooke wanted to "address the Court."[9] Defense counsel also explained that, although Cooke might not necessarily "act out in the courtroom," Cooke's "level of agitation [wa]s rising" and that it would be best if the court addressed the matters with Cooke somewhere other than in the courtroom in the presence of the media and the public. Defense counsel explained, "I think that that has the possibility of making it into the paper and possibly tampering with the jury's judgment of this gentleman at this stage of the trial."

The trial judge agreed that if he spoke with Cooke, it should be somewhere other than in the courtroom but would have to remain a public proceeding nonetheless.[10] The trial judge concluded that he was obligated to let Cooke speak to him, "and it might be best if I did so sooner rather than later to let

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[9] Defense counsel explained that Cooke wanted to speak to the judge about "the theme of wanting the whole videotapes heard by the jury, that he feels that his constitutional rights have been deprived, that he feels that the prosecution in this case has racial motivation, that he feels that the Court isn't following the rules that it's supposed to follow or the Constitution."

[10] The trial judge said:

> If I spoke to him, it would be in a situation where I would hope that we could preserve the proceedings in a way that they 'remain public' without drawing, if I can say this in the same breath, undue attention to him if you catch my drift because any proceeding has to be public.

some of the steam off." The trial judge preferred to wait until after the defense's opening statement. The trial judge's reason for waiting was that Cooke would have a chance to hear what his counsel said "to a jury in an open courtroom in a public setting" and could "factor that in." The trial judge wanted Cooke to have a chance to "hear his legal voice in the same context as he heard the State's legal voice."

The State contended that it was best if the trial judge spoke to Cooke as soon as possible, preferably before the defense's opening statement, because Cooke had wanted "to talk to [the trial judge] for a couple of days now and it would be better if we can control the timing and the place of that discussion to prevent him from simply blurting things out in ways that could prejudice the trial."

Defense counsel agreed with the trial judge that it made sense to conduct the colloquy after the defense's opening statement, but requested that the trial judge inform Cooke of that timeframe in open court. The trial judge told defense counsel that he would not address Cooke in open court prior to the defense's opening statement and that, instead, defense counsel should explain to Cooke that he would have a chance to address the judge after the opening statement. The trial judge wanted defense counsel to explain to Cooke that he wanted Cooke to hear what his attorneys had to say first.

Cooke had not had any outbursts during the State's opening statement, but had grumbled from

time to time. The State asked defense counsel if they thought Cooke could make it through the defense's opening statement without having an outburst and defense counsel said that they thought he could, although he might continue grumbling. Defense counsel stated: "I have indicated to him that his family supports what I'm intending to do and that may dissuade him to some extent, but I can't guarantee."

The statements made during that conversation suggest that defense counsel and the prosecutors knew that Cooke's outbursts were precipitated by his objection to the presentation of mental illness evidence. The State was very concerned that Cooke would have an outburst in court if the trial judge did not speak to Cooke before the defense's opening statement and before defense counsel mentioned Cooke's mental illness or a guilty but mentally ill verdict in its opening statement. The conference ended and defense counsel spoke with Cooke privately.

The jury was brought back into the courtroom. Defense counsel made the opening statement, which focused entirely on Cooke's mental illness and requested a verdict of guilty but mentally ill.[11] When

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[11] Defense counsel stated in the opening statement:

> [W]hat the defense is going to do is to prove that Mr. Cooke is mentally ill. And at the end of this part of the case, the defense is going to ask you that you find Mr. Cooke mentally ill and really that's all we're going to ask you to do. We're not going to ask you to ignore substantial evidence presented by the State. We're

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the defense concluded its opening statement, the trial judge excused the jury and the public and announced that proceedings would continue following the lunch recess.

Prior to the resumption of the trial, the trial judge met with the prosecutor, defense counsel, Cooke, and a court reporter in a separate courtroom. The trial judge told Cooke that he had the opportunity to speak about his concerns. Cooke said that he would prefer to speak in the presence of the jury. The trial judge explained that Cooke would have the opportunity to address the jury later in the trial if he chose to testify, but for now he could tell the judge about any questions or concerns that he had. Cooke first explained that he was concerned that his attorneys would not ask witnesses the questions he wanted his attorneys to ask. The trial judge said that the attorneys normally decide which questions to ask the witnesses, but Cooke was free to give his attorneys his suggestions. Cooke's second concern was that the State was lying and his attorneys would not

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simply going to ask you to look at all of the evidence that is presented to you during this trial. Now, before outlining the evidence that the defense will present to you, I want to explain to you that finding Mr. Cooke mentally ill does not mean that he's not guilty. If, based on the evidence presented, you find him guilty, then consider all of the evidence and if you find to your satisfaction that the evidence establishes that he's mentally ill, say so. That's what we're asking and that would result in a finding of guilty but mentally ill.

contradict the lies. The trial judge explained that he was not Cooke's lawyer and was simply trying to find out if there was some problem that was really bothering Cooke that the trial judge could address.

Cooke responded as follows:

> Yeah, sure. I'm full of matters. I've got a lot of problems, I mean, with my counselors. They went beyond, you know, the reasons that – with this mental ill defense. I never agreed to none of that stuff and I've got the papers, you know, that prove I never agreed to that stuff and that's like going over my head, taking my rights from me, you know.

Rather than address the dispute between Cooke and his attorneys about the decision to pursue the guilty but mentally ill verdict, the trial judge said to Cooke, "I'm not so sure I want to get into advice between you and your lawyers on that issue, Mr. Cooke. It's not really my function."

Cooke persisted, stating that he did not agree to the presentation of the mental illness evidence and that his attorneys knew that, but were presenting the evidence anyway.[12] Cooke also explained that he did

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[12] Cooke also seemed to argue that it was contrary to the rules of professional conduct for lawyers to present such evidence over a defendant's objections. He said: "That's like putting me in the position where, you know, that's like they running over because they got the legal license to do it. It's like they could be [dis]barred for what they doing because, I mean, as a

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not want the State to play portions of the tape recordings of the police interview with his girlfriend, Rochelle Campbell, without playing the entire recording. The trial judge told Cooke that the decision to play all or a portion of the recordings was a decision for Cooke's attorneys to make because "[t]hat is a tactical decision." Cooke responded:

> That's their tactic. That's not my strategy. If I'm telling you right now that I have talked to them about that and we disagree on that, they going to still override me and it's going to make it look like I'm pushing that issue that way. I'm not pushing that issue that way. They're using their own strategies. You know, their strategy, they want those pieces to be seen to make it look like I'm this mentally ill person, you know. That's wrong.

The trial judge addressed Cooke's other concerns, but never addressed Cooke's objection to his attorneys presenting evidence to support a guilty but mentally ill verdict. Trial then reconvened in Courtroom 8B, and the State began presenting evidence in its case-in-chief.

The trial continued without any mention of the dispute between Cooke and his attorneys about the guilty but mentally ill verdict and without any outbursts by Cooke, until February 5, during the

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professional as they supposed to be under the law, the lawyer conduct, they aren't supposed to be doing that."

prosecutor's direct examination of Amalia Cuadra about the burglary of her home. Cooke interrupted her testimony when he said: "Oh, man. I don't care. Excuse me, man." The jury was taken out of the courtroom. Cooke continued: "Oh, man. You setting me up in this whole place. They don't even know me. Only got four different reports here, man. Four different reports. Give me my stuff. Give me my stuff."[13] The trial judge excused Cooke and his counsel so that counsel could try to help Cooke calm down.

After meeting with Cooke, defense counsel reported to the trial judge that Cooke was very agitated and "expressed his opinion about what is happening here in the trial." Defense counsel explained that in Cooke's opinion, "it has not been a fair proceeding and he thinks he's being railroaded." Defense counsel had reminded Cooke that, if he wanted to remain in the courtroom, he would have to abide by court rules and could not talk until he testified. Defense counsel reported, however, that "I cannot guarantee that he will not have another outburst."

The trial judge decided to stop the proceedings for the day to give Cooke time to calm down overnight. The trial judge said that he would talk to Cooke in the morning, before Cuadra resumed her testimony, and would advise Cooke about the risks of

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[13] Cooke was apparently upset because Cuadra gave the police a few different descriptions of what the intruder looked like.

having another outburst in court. The prosecutor appeared frustrated that Cooke had interrupted the trial testimony. He said: "It seems to me unfair to allow the defendant to cause a recess in the proceedings because of misconduct. He doesn't have a right to recess the proceedings." The trial judge said that Cooke "has a right to be present, which I have to respect."[14]

The next morning, February 6, before the jury was brought into the courtroom, the trial judge addressed Cooke and explained that it was not in Cooke's best interest to display the verbal conduct that he had displayed the day before, during Cuadra's testimony and in the presence of the jury. The trial judge explained that if another similar incident occurred, "I may have to decide at that point . . . that you would have to be removed from the courtroom.

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[14] The trial judge explained that he would talk to Cooke when Cooke was "in a more listening frame of mind than he is now." The trial judge also explained that he would have to give Cooke warnings about causing disruptions in court and the risk that he could be removed from the courtroom. He asked for the TV to be set up in Courtroom 6D in case Cooke needed to watch the proceedings from a holding cell via closed-circuit television, explaining that after the *Starling* trial, he asked JIC (the Judicial Information Center responsible for court technology) "to install a television set in the holding cell so that the defendant could be in the holding cell, see the witness, and then counsel could go and speak to the defendant in the holding cell before he cross-examined the witness, even to find out they didn't want to cross-examine and things like that."

Then the trial would continue without you present in the courtroom."

When the trial judge asked if Cooke understood him, Cooke asked if he could speak. The trial judge told Cooke that he could not. Cooke then accused the trial judge of threatening him during the February 2 colloquy and of violating his constitutional rights. Cooke also said: "I told you they wasn't representing me right. You still allowed that to go." Cooke seemed to be referring to the fact that his counsel mentioned the guilty but mentally ill verdict in their opening statement despite his objection.

Cooke also was angry about the possibility that certain tape recorded interviews would not be played in their entirety. The trial judge had Cooke removed from the courtroom and held that Cooke could not return until he informed his lawyers that he could be quiet in the presence of the jury. The court took a recess.

About twenty minutes later, defense counsel reported that Cooke was ready to return and would not misbehave in front of the jury. Defense counsel also explained that Cooke understood that he could be banished from the courtroom and forced to watch the trial by closed-circuit television from a holding cell if he had another outburst.[15] The trial judge requested

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[15] The trial judge said he was concerned that, if Cooke watched the proceedings from the holding cell, the jury and the people in the gallery would hear Cooke if he raised his voice,

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that Cooke be brought back into the courtroom, and asked Cooke if he could behave in the presence of the jury. Rather than respond to the trial judge's question about whether he understood that he needed to remain quiet during the proceedings, the defendant answered: "I do understand that you're racial, biased." The trial judge asked again if the defendant could remain in the courtroom without having another "verbal statement such as you had yesterday afternoon" and the defendant did not respond. The trial judge decided to "give it a try." The trial judge had the jury brought back in and instructed the prosecution to call its witness.

Later that day, the prosecution concluded its direct examination of Cuadra. When the prosecution finished its direct examination, a short side-bar conference was held. After the side-bar, defense counsel stated that they had no questions for Cuadra on cross-examination. The trial judge excused the witness, and Cooke had another outburst, presumably because his attorneys did not to [sic] cross-examine Cuadra. Cooke said: "No, no, you can't keep railroading me; you railroading me like this. Come on, man, you keep railroading me like this; oh man, this is a racial case; oh man." The trial judge asked that the jury be removed as Cooke continued: "All these witnesses pass here. You got no questions for none of them. All

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because the holding cell was just behind the courtroom. The trial judge was concerned about the publicity that might garner.

of the statements these ladies made, oh man, oh. Ain't no shush, shush. These women said it was a dark male."

At that point, defense counsel said: "Your Honor, we ask that Cooke be removed" and Cooke was escorted out of the courtroom. The witness was excused and there was a short recess so defense counsel could talk to Cooke. After the recess, defense counsel explained that Cooke remained agitated but wanted to return to the courtroom. Cooke was brought back in, and the trial judge told Cooke that his right to be present in the courtroom was not absolute and could be surrendered if he was disruptive by commenting on a witness's testimony in the presence of the jury. The trial judge also explained that if Cooke had another outburst, the trial judge would move the trial to another courtroom and Cooke would have to watch the trial by television from a holding cell. The trial judge did not give Cooke an opportunity to speak.

Trial resumed on Monday, February 8, with the testimony of Georgia Carter, a handwriting analyst. The prosecution began with voir dire outside the presence of the jury. Cooke had another outburst. He was removed from the courtroom and the trial judge explained that Cooke's disruptions were not tolerable, even outside the presence of the jury. The trial judge stated that voir dire would continue without Cooke, and afterwards, he would check to see if Cooke was "willing to behave." The trial judge noted that Cooke had already had three outbursts in the presence of

the jury, in addition to this one outside the jury's presence.

Defense counsel continued cross-examination and voir dire of Carter. When voir dire concluded, the trial judge excused the parties so that defense counsel could speak to Cooke and see if he was prepared to return to the courtroom. Defense counsel returned for a sidebar conference and reported that Cooke had calmed down and wanted to return. Defense counsel also reported that Cooke expected the Court to engage in a colloquy with him about his courtroom behavior.

Cooke was brought back into the courtroom and the trial judge began to explain to Cooke that he had a right to be present in the courtroom. Cooke replied: "You have a right to give me my fair trial?" The trial judge answered that Cooke's right to be present in the courtroom was not absolute and could be forfeited by disruptive behavior. The trial judge said his purpose was to give Cooke a fair trial. Cooke said: "Ain't no fair trial. You telling me fair trial?" The trial judge asked Cooke to decide whether he wanted to remain in the courtroom or be excused, and Cooke replied that the trial judge could do whatever he wanted to do because it was the trial judge's courtroom. The trial judge said: "Mr. Cooke, it is your right, sir. It is

your choice." Cooke had another outburst at that point, his second outside the presence of the jury.[16]

Cooke was removed from the courtroom. When the jury was brought in, the trial judge instructed the jury that they were not to construe Cooke's absence from the courtroom as an indication of his guilt. The prosecution conducted its direct examination of Carter without Cooke present. Cooke did not watch the proceedings by closed-circuit television because

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[16] The outburst went as follows:

> **The Defendant:** You're talking about my 6th Amendment Right; what about my 12th, my 14th, my 15th, my 19th, what about them Constitutional Rights? What about that? Don't I get an equal? I'm not equal? What about my 5th Amendment? I keep passing the documents to him [likely indicating his trial counsel]. He's not representing me right, that's misrepresenting me. What about the video you not allowing them to see? What about that? What about the evidence that Detective Rubin is hiding? Huh? About the pipe he found? Huh? What about the boots at 208 Murray Road? He seized my boots on that, not no homicide. What about the hair that was found on Lindsey Bonistall's left hand that was Caucasian? What about the two DNA documents I got? Three DNAs found in that young woman, European, Native American and African. What about that? Tell the people about that. Yeah.
>
> **The Court:** Out, sir. You waived your presence in this courtroom. I cannot be assured that you will not be disruptive in the presence of the jury and harm your case. You've waived your right to be present.
>
> **The Defendant:** What you talking about? I ain't waiving no rights.

Courtroom 8B was not configured with a camera for that purpose. The camera was in Courtroom 6D and the trial judge had not yet decided to move the proceedings to that courtroom.

Around 2 p.m., the parties reconvened and Cooke was brought back into the courtroom. Again, the trial judge asked Cooke if he could remain quiet and not be disruptive. Cooke brought up his dispute with his attorneys about seeking the guilty but mentally ill verdict. He said: "Why did you give me public defenders that's not representing me right? I talked to you about that on that Friday, February the 2nd. I didn't never pick this guilty but mentally ill. They said I was guilty." The trial judge said that Cooke's concern was "a matter of record already" and "not under discussion at this point." Cooke said: "But the more I tell you, the more you allow this stuff to go on." The trial judge said that there was nothing that he could say to Cooke at that point. The discussion continued as follows:

> **The Defendant:** I mean, you can, you a Judge.
>
> **The Court:** No, not at this point.
>
> **The Defendant:** That means you just putting me on a railroad track and letting the train run over me.
>
> **The Court:** Mr. Cooke, I would not sit here as a Judge and allow anyone to be railroaded.

The Defendant: That's what you doing. You are doing that, you capable to do something about that.

The Court: I can't stop you from having that opinion if you want but –

The Defendant: That's not opinion. That's the truth. I'm being railroaded. I'm speaking from the heart. You might be speaking from the mouth.

The Court: Well, Mr. Cooke, getting back to my question: Are you going to remain quiet if you stay here in the courtroom?

The Defendant: I already gave you my word. I said at the beginning.

The trial judge determined that Cooke would behave and had the jury brought back into the courtroom. The prosecution continued the presentation of its case-in-chief without any disruptions from Cooke for the rest of the day.

Trial resumed on Thursday, February 15, and Cooke returned to the courtroom. The trial judge asked Cooke if he could behave, meaning "no further verbal outbursts at any time or other kind of demonstrations such as hitting the desk or doing anything else like that." Cooke said he would behave. Before the jury was brought into the courtroom, defense counsel told the trial judge that Cooke wanted to leave the courtroom when the medical examiner's photographs were introduced and the medical examiner testified. The trial judge addressed Cooke

directly and asked whether he chose to leave the courtroom and return to the holding cell. Cooke said that he did want to leave and return to the holding cell. Cooke said he would return for the testimony of Detectives Rubin and Maiura but did not want to be present for the medical examiner's testimony. The trial judge excused Cooke.

Defense counsel had explained to Cooke that portions of the video tapes from the Newark Police interrogation and handwriting exemplar session were going to be played. The trial judge noted that one of Cooke's concerns about the trial was that he wanted the entire tapes from those two sessions played and not just portions selected by the State. The trial judge decided to speak to Cooke before the detectives' testimony to explain that only portions of the tapes would be played and to warn Cooke not to have an outburst.

Cooke was then brought back into the courtroom and the trial judge explained that only portions of the taped sessions would be played. Cooke said that he understood but thought it was unfair, because he was treated badly by the police and those portions of the tape would not be shown to the jury. Cooke felt that the prosecution was "tampering with evidence" because they were not showing the entire tape. The trial judge tried to explain that failure to show the entire tape did not constitute tampering with evidence. The trial judge also explained that he had watched the entire videotape of the session with the handwriting analyst for a pre-trial ruling regarding its admissibility, but had not watched the tape of the

police interrogation. The discussion continued as follows:

> **The Defendant:** You can't cut pieces out like that. What they said about me and stuff like that. Remember they depicted, they called me the killer first. They called me the killer. They came at me like that.
>
> **The Court:** Okay. Well, let me tell you, Mr. Cooke. The problem is that probably would be inadmissible anyway because the police view of whether you're guilty or not –
>
> **The Defendant:** Let the jury decide that.
>
> **The Court:** That's exactly the point.
>
> **The Defendant:** [If you're] not playing the whole thing, they can't decide that. They will decide what them put on the table. They not laying the whole foundation.
>
> **The Court:** Well, there's been an agreement about what should be shown or not shown, both from the point of view of the prosecution wanting to show what it needs to show and what your attorneys believe would be –
>
> **The Defendant:** They're not working for me. I'm not guilty. They use that mentally ill. I didn't agree with that. You know that.
>
> **The Court:** Mr. Cooke, I know that you don't agree with it, and that's why I'm –
>
> **The Defendant:** Why are you allowing it to go on?

The Court: Because –

The Defendant: That's unconstitutional, though.

The Court: No, it's not, sir.

The Defendant: Yes, that is. . . . You can't give me somebody that is not representing me right. You forcing them on me.

The Court: That's not true.

The Defendant: That is true.

The Court: Anyway, I'm not going into the details of that at this point.

The trial judge asked Cooke whether he could remain in the courtroom without having an outburst while portions of the videotapes were played for the jury or whether he should be removed. Cooke indicated that he would stay and be quiet.

The jury was brought in and the State recalled Detective Maiura. The defense did not conduct cross-examination. Next, the prosecution called Detective Rubin. The defense did not conduct cross-examination of Detective Rubin either. The jury was taken out of the courtroom. Because the medical examiner was going to testify next, the trial judge gave Cooke the opportunity to leave the courtroom, since Cooke had indicated earlier that he did not want to be present for the medical examiner's testimony. Cooke said: "I'm staying"; and he was permitted to stay.

The jury was brought back into the courtroom and the prosecution conducted voir dire of the medical examiner. Defense counsel declined to conduct voir dire. The prosecution began its direct examination by asking the medical examiner about the autopsy of Lindsey Bonistall and about photographs of the victim's body. The trial judge interrupted the direct examination to give the jury an instruction, warning that some of the photos would be unpleasant and reminding the jurors that they had to decide the case without being influenced by emotion or sympathy. The trial judge concluded: "So, please keep those instructions in mind as you view the photographs, which will now be presented to you by the State." This precipitated another outburst by Cooke. He said: "Instruction? I'm not guilty. I'm not guilty. And they chose this mentally ill, and not me. You know, yeah, keep that in mind." The jury was taken out of the courtroom and Cooke was removed.

Defense counsel asked the trial judge to declare a mistrial because Cooke told the jury about his dispute with counsel about pursuing the guilty but mentally ill verdict. Defense counsel said:

> The remarks that the defendant made were louder than he normally does and specifically addressed the statement . . . basically to the effect that "this mental ill defense is not what I'm about," and "I'm not guilty," and phrases to that effect. That's highly prejudicial to the defense that we're putting on at this point. The outburst itself was

> disturbing, I would imagine, to the jury. The correctional officers did a fine job of moving him from the courtroom with as little disruption as possible; nevertheless, this is, to my count, the eighth or ninth time that they witnessed an outburst like this. And as such, we feel that the ability for him to have a fair trial in front of this jury has been so prejudiced that the Court needs to declare a mistrial.

The State responded that the dispute between Cooke and his counsel about presentation of the mental illness evidence "was caused by Cooke and by counsel, not by the State," and therefore the trial should proceed. The prosecutor noted that "[o]ne can easily envision if Cooke testifies we might hear similar kinds of outbursts, and the State had in the past, in the course of this proceeding cautioned that allowing this conflict to fester between counsel and defendant could cause problems." The trial judge noted that "the writ of mandamus has been denied." The State explained that it was concerned that Cooke was causing the problems and should not be able to benefit from his own misconduct.

The trial judge addressed the arguments and explained his position as follows:

> I start from the premise that there's been no dispute about this defendant's competence to stand trial, that he's been found competent to stand trial. . . . That means he's competent to assist counsel or not assist counsel. He does not assist counsel by these outbursts.

> The issue of these outbursts, it's a little hard to say, because . . . while the Court has read some of the material submitted by the parties in connection with . . . partly the issue raised in the writ of mandamus, as well as the ongoing matter in this Court, as far as the claims by Mr. Cooke about his wishes versus . . . how defense counsel have approached this case. Again, there's nothing in what I have read in the reports from the two experts retained by the defense which would indicate . . . that Mr. Cooke is incapable of standing trial [or] incapable of making conscious decisions about things, including how he conducts himself in this courtroom or in court.

The trial judge noted that originally Cooke did not want to be present for the medical examiner's testimony, but later decided that he wanted to stay. Then, Cooke had an outburst when the medical examiner began to testify. The trial judge concluded that there was nothing in the psychiatric expert's reports to suggest that Cooke was incompetent to stand trial and therefore the trial judge found that Cooke's outbursts were voluntary. He explained: "I'm disturbed by the fact that he said he could remain in the courtroom for the medical examiner's testimony, would remain calm, and then chose to have this outburst in the presence of the jury, which I view as entirely within his power to do or not to do."

The trial judge stated that any prejudice caused by Cooke's conduct was "self-created" and denied the

motion for a mistrial. The record reflects that the trial judge was focused more on the prejudicial effects of Cooke's outbursts than on Cooke's objection to his attorneys presenting evidence to support a guilty but mentally ill verdict. The trial judge did not directly address the dispute or attempt to resolve it.

The prosecution requested that the trial judge rule, based on Cooke's repeated outbursts and misconduct, that Cooke waived his right to be present in the courtroom. The prosecution wanted Cooke excluded from the remainder of the proceedings, particularly because the defense's case-in-chief would focus entirely on Cooke's mental illness. The prosecutor explained that, "given that Cooke has repeatedly said on the record, and now in front of the jury, [that] he does not want that defense to be pursued, it is, I think, unreasonable to expect that he will control himself or behave himself."

Defense counsel asked to wait until the next morning to decide the issue so that Cooke had time to calm down, but suggested that they continue the rest of the day's proceedings without Cooke. The trial judge agreed that Cooke had waived his right to be present for the rest of the day, and the proceedings continued. Cooke watched by television from the holding cell.

After the medical examiner testified that the cause of death was strangulation, the prosecution concluded its direct examination and defense counsel engaged in a brief cross-examination. Defense counsel

asked the medical examiner if she had an opinion as to whether Cooke was mentally ill at the time of the crime. The medical examiner said that she did not have an opinion and could not address that issue. That was the extent of defense counsel's cross-examination. The State rested its case-in-chief. The defense moved for a judgment of acquittal without additional comment. The trial judge ruled that the State had established a prima facie case on all of the charges and denied the motion.

5. *The Defense's Case.*

The next morning, Friday, February 16, defense counsel informed the trial judge that Cooke wanted to be present for the presentation of the defense testimony. Defense counsel also requested that the trial judge engage in a colloquy with Cooke. The trial judge was concerned that Cooke would continue to have outbursts during the defense's case because Cooke did not agree with his attorneys' decision to pursue the guilty but mentally ill verdict and to present evidence accordingly. Defense counsel's response to the trial judge indicated that they agreed Cooke might have more outbursts during their presentation. The discussion went as follows:

> **The Court:** Let me ask you, particularly because of his different views of approach to this case, shall we say, since we are now getting into the defense case on an issue in terms of the approach which counsel are

taking, with which he's disagreed, how is he going to respond to that?

Defense Attorney 1: I think that's a fair observation, and that's all I'll say.

Defense Attorney 2: I have to concur with [co-counsel]. That's all I have to say.

The trial judge explained that Cooke risked further prejudicing his case if he had more outbursts in front of the jury. The trial judge asked defense counsel if it would be helpful to have Cooke sit at counsel table during the presentation of the defense's case. Defense counsel responded that it would "probably not" be helpful to have Cooke present because "we have met with our witnesses. We have prepared our direct examination of the witnesses, . . . but I can't say that his input will [be helpful] – unless he's changed his views of the type of defense that we're presenting."

The prosecutor renewed the State's motion for a ruling that Cooke was excluded from the remainder of the proceedings. The prosecutor explained:

> There's absolutely no reason to believe that he will be outburst – free during the remainder of the proceedings, past being prologue. In particular, we note that there has been a consistent theme or themes . . . that have resulted in his outbursts, and one of those themes relates to . . . the defense counsel's pursuit of a mental illness defense over the defendant's wishes. That's what we are about to spend the next week or so talking about.

The prosecutor requested in the alternative that the trial judge explain to Cooke that he will waive his right to be present in the courtroom, other than when he testifies, "if he has another outburst in front of the jury" or "mentions the mental illness defense and his disagreement with it in front of the jury."

In ruling on the State's motion, the trial judge noted that the defense's case would focus on the guilty but mentally ill verdict and that Cooke disagreed with that approach. The trial judge did not address the disagreement. He was more concerned about Cooke's outbursts and what Cooke said in front of the jury. The trial judge noted that there had been four outbursts in the presence of the jury at that point and four outbursts outside the jury's presence. However, he also noted that, the day before, Cooke had, for the first time, mentioned his disagreement with his attorneys in the presence of the jury and spoke in a louder voice than usual. The trial judge explained that the first three outbursts in front of the jury were "stage-whispered" but that the outburst the previous day was much louder.

The trial judge concluded that Cooke had a right to be present during the presentation of his case and decided to engage in another colloquy with Cooke. Cooke was brought into the courtroom for the colloquy. The trial judge asked if Cooke wanted to be present and Cooke said that he did. The trial judge also explained that Cooke's attorneys would be presenting witnesses on his behalf "in connection with the approach they believe is the approach to be

taken in this case." The trial judge told Cooke that he recognized that it was an approach that Cooke disagreed with, as indicated by Cooke's comments.

Cooke again told the trial judge that he disagreed with his attorneys' approach. The trial judge did not address the disagreement, but instead said: "Now, that raises a question in my mind whether, when you're listening to this kind of evidence, evidence of a defense with which you disagree, you're going to be able to remain calm and not have any further outbursts in the presence of the jury." Cooke said that he could be calm, but explained: "All I'm saying, I never even, you know, discussed this with them about this. They took it on their own self. They took that by force. I mean, that's just run over me, period." He seemed to be saying that he did not want his attorneys to present evidence to support a guilty but mentally ill verdict and was upset because they were proceeding that way despite his objections.

The trial judge said again that Cooke's attorneys would "present witnesses in connection with the approach they have deemed appropriate," even if Cooke disagreed with that approach. The trial judge asked Cooke if he could remain calm in the courtroom even though he disagreed with the approach his attorneys were taking. Cooke said: "Yes, I can. But I brought this to your attention plenty of times." The trial judge said: "Yes, I know you have." And Cooke responded: "I mean, it's like you're ignoring it." The judge explained that he understood Cooke's position but "we are getting into areas that I can't get into." The trial

judge asked Cooke again if he could be quiet in the courtroom, "even though you disagree with the approach that your attorneys are taking regarding the evidence they're now going to present." Cooke said that he could be quiet. The trial judge warned Cooke that he would return to the holding cell if he had another outburst.

The defense called its first witness, Cooke's brother Rickie Patillo. Patillo testified about Cooke's difficult childhood, which included child abuse. Patillo testified that Cooke was treated differently than his siblings, was teased a lot as a child and did not have many friends. Patillo also testified that they had to steal food to eat, and that Cooke often got into trouble at school. During cross-examination, the prosecutor asked Patillo about Cooke's history as a drug dealer and his earlier conviction for drug dealing in New Jersey. Cooke's next outburst was precipitated by this discussion:

> **The Prosecutor:** And that wasn't a surprise to you, because the whole time that you were growing up, you knew that the defendant was repeatedly doing things that either did get him arrested or at least could have got him arrested had he been caught, right?
>
> **The Witness:** Right.
>
> **The Prosecutor:** He was stealing things, right?
>
> **The Witness:** Yes.

The Prosecutor: Sometimes he was assaulting people, right?

The Defendant: No.

The Witness: No. I don't remember that. I don't remember that.

The Defendant: They make me take a mentally-ill and –

The trial judge ordered that Cooke be removed. Cooke continued: "A mental ill defense? He setting me up in this. You taking my rights from me and everything." The jury was excused. Cooke was escorted from the courtroom.

Defense counsel again moved for a mistrial. The trial judge noted that "for the first time, the defendant substantially resisted being taken from the courtroom, and two correctional officers, two bailiffs, and Detective Rubin had to participate in restraining him." Cooke had to be physically restrained on the floor between the counsel tables. The struggle took place while the jury was being escorted out, but some jurors saw Cooke being restrained.

The trial judge also noted that it was the third or fourth time that Cooke said he could be calm and then had an outburst in front of the jury and that the outbursts were precipitated by Cooke's attorneys presenting evidence of his mental illness. The trial judge said: "I thought that I was very clear with him, and he said that he understood, that he was now going to hear testimony that would be consistent with the

defense that [his attorneys] believe was in his best interests but one with which he disagreed. And he had to behave while he listened to that."

Again, the trial judge concluded that Cooke's conduct was intentional and that Cooke volitionally chose to have outbursts after assuring the judge that he would be quiet. The trial judge noted that Cooke engaged in his outburst when "the defense was seeking to portray a very difficult childhood through this first witness, as they indicated in their opening several weeks ago." The trial judge ruled that Cooke would remain in the holding cell and watch the proceedings by television.[17]

Soon after, the trial judge was notified that Cooke was taken to the basement of the courthouse, rather than the holding cell behind the courtroom, and was in isolation so that he could be subdued. The trial judge asked that Cooke be brought back up to the holding cell once he calmed down so that Cooke could watch the proceedings from there.

In the meantime, trial continued. The jury was brought back into the courtroom. The witness was put back on the stand and the defense continued with

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[17] The trial judge wanted to ensure that the record reflected that "this conduct is intentional, and therefore, he has, through his conduct, intentionally chosen to be persistently disruptive and demonstrated that he's incapable of remaining in this courtroom to watch the proceedings. It's regrettable, but that's his choice."

its case, which focused on Cooke's mental illness. Patillo's testimony was followed by the testimony of three more witnesses.

Trial resumed on Tuesday, February 20. Before the proceedings began for the morning, the prosecution moved for an instruction that, if Cooke chose to testify, he could waive his right to testify by "contumacious conduct," such as continuing to speak after the trial judge has asked him to be silent or sustained an objection. The prosecutor was particularly concerned that Cooke would take the stand and talk about the dispute with his attorneys about their pursuit of the guilty but mentally ill verdict. The prosecutor said: "So we would ask that upon the first mention of the mental illness dispute by the defendant, his testimony will be terminated and he will be removed from the courtroom."

The prosecutor cited three cases in support of his argument and noted that Cooke had ten outbursts in the courtroom so far. The prosecutor said he believed that Cooke would testify that the State had fabricated evidence and other "less than flattering things about the prosecutors," but said: "That's fine." The prosecutor objected, however, to Cooke "let[ting] the jury in on the dispute he's having with counsel" because it is "obviously irrelevant," "prejudicial," and "will create a mess that an appellate court might take years to sort through." The trial judge told defense counsel they could read the cases cited by the State before responding.

The trial judge called in the jury and the defense continued its case with the testimony of Dr. Alvin Turner, a psychologist who had evaluated Cooke. During Dr. Turner's testimony, without seeking a waiver of the psychoanalyst-patient privilege from Cooke, defense counsel asked whether Cooke had talked to Dr. Turner about the events surrounding Bonistall's death. Dr. Turner said that Cooke told him different things at different times, including that Cooke got angry at Bonistall after they had consensual sex, while they were laying in bed, and "he remembers standing up, with her sitting on the bed, and choking her. He said that he didn't understand why he did it." Dr. Turner also testified that Cooke said: "I couldn't believe it. I don't remember everything. I didn't know what I was doing. I couldn't believe she was dead"; but that on other occasions, Cooke would deny killing Bonistall and deny that he ever told Dr. Turner otherwise.

Defense counsel referred to a report by Dr. Turner and asked: "And did you write there, for example, 'At times he,' meaning Mr. Cooke, 'would describe realistic versions of having sex with the victim, choking her and killing her and then at other times he would deny having committed the crime at all?'" Dr. Turner said: "Yes."

On February 21, the trial judge began the proceedings by asking defense counsel whether Cooke wanted to return to the courtroom. Defense counsel had not asked Cooke if he wanted to return but Cooke had not affirmatively expressed any desire to return.

Cooke did say that he watched the previous day's proceedings from the holding cell. The trial judge gave defense counsel permission to interrupt the proceedings at any time to speak to Cooke if they needed to. Trial continued with additional cross-examination of Dr. Turner. After re-direct, the defense called its next witness, Dr. Lawson Bernstein, a neuropsychiatrist who had examined Cooke. When the proceedings concluded for the day, defense counsel reported that Cooke had not yet decided whether or not to testify and that they would give the trial judge a report in the morning.

Before the trial judge excused the parties, the prosecutor asked for a ruling on the State's motion to admit evidence of the crimes Cooke allegedly committed in New Jersey, following the alleged crimes in Newark, Delaware. The prosecutor said: "I would ask your Honor to consider the shifting landscape as of today; to wit, Cooke's confession is now in evidence." The prosecutor argued that the prejudice that normally surrounds admitting evidence of uncharged misconduct – that the "jury will take what happened in another crime and assume guilt in the instant case" – is no longer an issue. The prosecutor said: "That issue is dead and gone now because Cooke has admitted at least that crime, that Bonistall burglary, rape and homicide. What's at issue in this case now, and really it's been an issue in the case first and foremost since [defense counsel's] wonderful opening statement, is Cooke's mental state."

The defense responded that Cooke's confession to the Bonistall homicide, admitted through the testimony of the defense expert witness, was "of no great consequence in this case" because the two home invasions committed prior to the Bonistall homicide "are really what are at issue." The defense objected to the admission of Cooke's later New Jersey home invasions because the jury might use the testimony to infer that Cooke was guilty of the earlier burglaries and home invasions in Delaware. The defense explained: "And that's where you cross the line of [Rule] 403. We don't contest the fact that mental illness is a defense here; however, the State still bears the burden of proof beyond a reasonable doubt on Cuadra and Harmon [the victims of the two prior home invasions]."

Later that day, the trial judge held a conference, in a conference room behind the courtroom, to discuss with the parties the attendant logistics if Cooke chose to testify. During the conference, they discussed Cooke's disagreement with his attorneys about seeking a guilty but mentally ill verdict. The prosecution raised the issue when it asked the trial judge whether the trial judge would "directly admonish [Cooke] not to get into the, 'I don't want the mental illness defense' business." The trial judge noted that Cooke had twice said in front of the jury that he did not want a guilty but mentally ill verdict and so the jury obviously knew that he disagreed with that approach. The prosecution believed that, although the jury knew that Cooke did not want the mental illness

evidence, the jury did not know that "the defendant is angry with his attorneys about it." The prosecution was concerned about having to "brief that issue for the rest of our lives about what happens when a defendant trashes his attorneys in his testimony in his trial."

Defense counsel also did not want Cooke to bring up his dispute with his attorneys. They had no objections, however, to Cooke testifying that he did not think he was mentally ill. Defense counsel also noted that Cooke had a right to say that he was not guilty. The trial judge and prosecution agreed. The prosecution clarified that they were concerned that Cooke would refuse to answer questions on direct or cross-examination and would instead talk about his frustration with the trial judge's pre-trial rulings and his anger with his attorneys. The prosecution recognized that, "clearly, he can say he's not guilty" and that "he's not mentally ill." A discussion off the record followed and the conference concluded.

On February 22, the last day of the defense's case, Cooke was not present in the courtroom and told his attorneys that he did not want to attend the proceedings. The defense called a social worker who had worked with Cooke while he was in prison, followed by a pastor who had offered Cooke religious counseling while he was in prison. During direct examination of the pastor, defense counsel requested a sidebar conference and asked the trial judge whether or not it was permissible to ask the pastor if Cooke had confessed to killing Lindsey Bonistall. Defense

counsel said: "I believe the answer [to that question] will be, 'Yes.'"

The trial judge excused the jury so the parties could discuss the issue more. The prosecution objected to the question because it called for hearsay. The defense argued that the pastor's testimony was relevant to bolster the testimony of Dr. Turner that Cooke had confessed to killing Bonistall. The trial judge was concerned that the pastor's testimony would violate the priest-penitent privilege and was not permissible without Cooke's express waiver.

Therefore, the trial judge asked the corrections officers to bring Cooke into the courtroom. The trial judge asked Cooke whether or not the pastor could testify about their conversations. Cooke responded that he did not want the pastor to testify. The trial judge concluded that Cooke had not waived the priest-penitent privilege and that the pastor could not testify about Cooke's confession to the homicide.[18]

During the lunch recess, Cooke was brought back into the courtroom and the trial judge had a colloquy with Cooke to determine whether or not he wanted to testify. Cooke said that he had not yet decided. The trial judge explained that Cooke had to decide now.

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[18] The trial judge noted, however, that defense counsel had acted in good faith in calling the pastor because the defendant had previously waived the privilege and so the privilege had been waived "until a minute ago," when Cooke told the trial judge he did not want the pastor to testify.

Cooke asked for ten more minutes to think about it and indicated that he wanted to talk to his attorneys about the decision.

When Cooke returned from meeting with his attorneys, he stated that he wanted to testify. Defense counsel stated that they had explained to Cooke that the trial judge would explain the limits of Cooke's right to testify and "the responsibilities that accompany his exercise of his right to testify." The trial judge told Cooke that he had to answer the questions he was asked, he had to be respectful and not argumentative, and that, although he could say that he is not guilty, he could not get into his dispute with his lawyers or any feelings he had about his lawyers and how they were handling his case. The trial judge told Cooke: "I'm not saying that you're not entitled to that opinion or whatever – you've expressed it several times in this courtroom and upstairs in 8B – but it's not a matter that is to come up during your testimony before the jury." The trial judge told Cooke that "[i]f you get into that area, I may have to interrupt you or there may be an objection from either one of your lawyers or the State about your testifying or making any comments along those lines." The trial judge also explained that Cooke could give up his right to testify and his testimony would be stricken if he became "too argumentative, too disrespectful, [did] not give responsive answers" or had an outburst.

When the colloquy concluded and Cooke was escorted out of the courtroom, defense counsel requested

a sidebar conference and asked for an *ex parte* conference with the trial judge regarding Cooke's testimony. Defense counsel stated:

> Your honor, we have a situation where, if the defendant is going to testify: A, it's going to be against his attorneys' advice, although he still has his right to testify; B, we have some trepidation about our tendering him as a witness, and for that reason we are going to request that we have an *ex parte* meeting about what we believe might happen, on the record.

Defense counsel explained that they preferred that the trial judge tender Cooke to testify. The trial judge granted defense counsel an *ex parte* conference in the trial judge's chambers before the jury returned from the luncheon recess.

At the *ex parte* conference in chambers, defense counsel explained:

> [T]he defendant is about to testify against his attorneys' advice and against his best interest. It could be a one-way ticket to the death house for him to testify and we really feel strongly that if he does choose to testify, he do it without the assistance of his attorneys. Our proposal would be, if he does proceed to testify, that the Court would have him at the stand when the jury is brought in and then briefly say to the jury that, "This is the time set . . . aside for Mr. Cooke to be able to testify to the jury. Mr. Cooke, you may now testify," or words to that effect. We

> don't want to ask him any questions because we don't think that it's in his best interest for us to ask him questions.

Defense counsel said they did not know what Cooke was going to say in his testimony, but "[they were] of the belief, beyond a reasonable doubt . . . that he's guilty of these offenses and [they were] of the reasonable belief that he will probably testify to the contrary." Defense counsel further explained that they did not think Cooke was going to commit perjury because they reasonably believed that Cooke "believes he's not guilty."

Defense counsel explained that Cooke at first denied having committed the crimes, then confessed in January 2006, but, by the spring of 2007, "had reverted to, 'I didn't do it.' And he's been of that solid opinion since then." Defense counsel said that Cooke had been nice and congenial in his conversations with his attorneys, "*but in terms of where the two ships are sailing in this litigation, they're not on the same course.*" Therefore, defense counsel did not want to present Cooke's testimony because they believed that Cooke would testify about what he believed was the truth – that he did not commit the crimes – but that this testimony would not be consistent with the truth – that he did commit the crimes.[19]

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[19] Defense counsel said: "[I]n my opinion right now at this moment in time, Mr. Cooke subjectively believes he did not kill Lindsey Bonistall. And that's his belief, notwithstanding the

(Continued on following page)

Defense counsel explained their main concern with calling Cooke to testify as follows: "[W]e're charged with representing him and we're trying to keep him from getting a death sentence. And in our view as his lawyers, participating in the direct examination with him would assist him not at all. It would hurt his chances to avoid a death sentence." Defense counsel consistently pursued a guilty but mentally ill verdict in an attempt to avoid a death sentence, but feared that if they called Cooke to testify – even if they simply introduced him and did not ask direct questions – "to the extent we have any credibility with this jury, we're going to undermine that."[20]

The trial judge recognized that defense counsel had already admitted Cooke's confession through the testimony of Dr. Turner, but also that from "what you're telling me, the indication is very strongly that he's going to say something to the opposite." Therefore, the trial judge determined that defense counsel did not need to call Cooke to testify. Instead, Cooke would be seated at the witness stand when the

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avalanche of evidence to the contrary. . . . [W]e cannot say, given our opinion of [Cooke's] subjective belief, that he did not kill Lindsey."

[20] Defense counsel said they thought Cooke would commit "legal suicide" when he testified because they believed he would testify to the effect that it was "consensual sex, I left, I didn't kill her, that's somebody else's problem, the Newark Police are setting me up, it's a racial thing."

jury was brought into the courtroom[21] and the trial judge would ask the clerk to administer the oath to Cooke and then Cooke could testify as he chose. The trial judge also said that if Cooke testified successfully and obeyed the court's rules, he could return to the courtroom for the remainder of the trial.

6. *Cooke Testifies.*

Proceedings continued in the courtroom that afternoon. When the jury was brought in, Cooke was seated as planned, with his legs shackled but hidden from the jury's view. The trial judge said: "The next witness will be the defendant, Mr. Cooke." The trial judge then administered the oath to Cooke and said: "All right. Mr. Cooke, you may proceed to testify, sir."

The very first thing Cooke told the jury was that he did not agree with his attorneys' decision to pursue a guilty but mentally ill verdict and that he was not guilty and was not mentally ill. He said: "First of all, I'd like to say I never picked this mentally ill defense. That was my public defenders' idea. Never chose it. Always argued about it." Cooke said he had consistently told his attorneys and the doctors that "I didn't do anything. . . . I didn't kill this person," but that his attorneys seemed not to care what he said.

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[21] Cooke's legs were to be shackled, but he would be seated so that his shackles were concealed.

The trial judge interrupted Cooke to remind him that he could not testify about that disagreement and told him to move on to another subject. Cooke proceeded to talk about his meetings with six different doctors who tried to "use psychology on me" but had already pre-judged him and formed the belief that he was guilty because his attorneys had told them so. "So that's why you heard what they said," explained Cooke, referring to the experts' testimony. Then he said: "So as the outbursts, as you heard me say, 'I'm not guilty. I never took this mentally ill defense.' You seen his presentation [referring to his counsel]. His presentation was 'Mr. Cooke is guilty but he's mentally ill.' . . . So he had misrepresented me and I'm quite sure you seen that as well. He know I didn't do this."

Cooke also testified about his frustration with the trial judge. He stated that he told the trial judge about his dispute with his attorneys, but the trial judge did not listen because he also believed Cooke was guilty. Cooke said to the trial judge, "And now you expect me to hold my tongue back . . . you expect me to abide by your rules. Like I'm supposed to fear you. The only person I fear is God. And if I die, like I said, I die for the truth. This woman wasn't who . . . they say she was."

Cooke then said to the jury: "[T]hey use the mentally ill defense to railroad me. They want to make you believe that I'm crazy." He also stated, "I been got rid of these public defenders. I fired them a long time ago. The judge allowed me to keep them." Cooke said

that he was being set up "because I had sex with the young woman." Later in his testimony, Cooke stated: "I'm not mentally ill. They know I'm not mentally ill. I'm quite sure the prosecutor know I'm not mentally ill. And the judge even know I'm not mentally ill. . . . They never wanted to fight the case, period. My own public defender told me when I first met him, he says, 'I'm not here to say you innocent, I'm only here to get the death penalty off you.'"

When Cooke began to talk about one of the jurors who Cooke believed had been involved in the crime, the prosecution objected and the trial judge asked the jury to be taken out of the courtroom. The trial judge reminded Cooke that he could not talk about the jurors and brought the jury back in. When Cooke started to talk about Bonistall, the prosecution objected again and the trial judge ordered the jury taken out again. The trial judge warned Cooke that he could not talk about Bonistall in front of the jury. Cooke seemed to argue that the jury had a right to know that he believed he had consensual sex with Bonistall. He said: "My public defenders even knew this and they never even spoke this up. Isn't that something? It's like I'm my own counselor."

The jury was brought back in and Cooke moved on to another, permissible topic for a while. When Cooke began to talk about a marijuana pipe that he believed was found in Bonistall's apartment and said that her roommate smoked marijuana, the trial judge ordered the jury out again. When the jury was brought back in, Cooke said, among other things, "How can a

man prove he's innocent if his public defender's not doing it? How? I mean, they actually want me to sit here and just take everything, you know." During his testimony, Cooke also told the jury that his legs were shackled under the table.

When Cooke concluded his testimony, he was cross-examined. When the prosecution concluded its cross-examination, the trial judge gave Cooke an opportunity for re-direct: "Mr. Cooke, if there's anything you wish to say in connection with the questions [the prosecutor] has asked you, now is your opportunity, sir." Cooke responded that he had nothing else to say "because I never done this, period." When Cooke and the jury were excused and left the courtroom, the trial judge ruled:

> It is my finding that based on the defendant's conduct this afternoon, he persists in conduct [that is] contumacious, disruptive, disrespectful and all other appropriate adjectives to a degree where he has waived his presence in this proceeding until some possible future point, which might be closing or the return of a verdict. I'm going to ask defense counsel to check with him each day to [affirmatively ask him] whether he wishes to return. And if he expresses that he wishes to do so, advise me and we'll evaluate that.

7. *The State's Rebuttal.*

On Monday, February 26, 2007 the State began its rebuttal. Cooke was not present. He watched the

proceedings from the holding cell. After the State presented the testimony of Dr. Mechanick, there was a recess so that defense counsel could ask Cooke if he had any questions for the doctor on cross-examination. Cooke indicated that he did not.

The next day, Cooke was still absent from the courtroom. Defense counsel told the trial judge that they had met with Cooke that morning to find out if he wanted to return to the courtroom and Cooke said that he did not. After the luncheon recess, before the jury returned to the courtroom, the trial judge discussed with the attorneys whether "guilty but mentally ill" was a defense, a mitigator (*i.e.*, something less than a conviction) or a conviction. A statement by the prosecutor led to a discussion that indicated that the trial judge and the attorneys knew that defense counsel's decision to pursue the guilty but mentally ill verdict, despite Cooke's objection, could have ramifications on appeal, but they did not know how to address the issue. The discussion went as follows:

> **The Prosecutor:** Well, it is a conviction, but it's not the same thing [as a finding of "guilty."] And if it is the same thing, then these guys [defense counsel] are professionally negligent in asking for it. I mean, let's not ignore the elephant in the room. Presumably, [defense counsel], as well-schooled and as technically proficient as they are, wouldn't be asking for a "guilty but mentally ill" verdict unless it was somehow advantageous. And that's all the Court is saying.

> Of course it's a conviction. So is extreme emotion distress.
>
> **The Court:** Let's not go down this avenue, please. Let's leave it there.

In the afternoon, the defense conducted cross-examination of Dr. Mechanick. Defense counsel asked the doctor about the dispute Cooke was having with his attorneys about the guilty but mentally ill verdict, presumably to support the defense's argument that Cooke was mentally ill. The doctor had testified that Cooke may have been malingering when he displayed symptoms of mental illness in prison. Defense counsel asked the doctor:

> [T]he evidence you have to consider that's before you, is that Mr. Cooke told Dr. Turner that he's not mentally ill and that he's not pursuing a mental illness defense; he told Dr. Bernstein that he's not mentally ill and that he's not pursuing a mental illness defense; he told you that he's not mentally ill and that he's not pursuing a mental illness defense; and he told this jury that he's not mentally ill and he's not pursuing a mental illness defense? Isn't that evidence that you have to go on right now?

In a follow-up question, defense counsel asked: "But you can say this: That what he said to you, what he said to Dr. Turner, what he said to Dr. Bernstein and what he said to this jury has been consistently, 'I'm not mentally ill and I'm not about a mental illness defense,' isn't that true?"

On Wednesday, February 28, Cooke wanted to return to the courtroom. Part of the prosecution's rebuttal evidence the previous day had included testimony and police reports about the New Jersey home invasions. Cooke wanted to address that evidence. Cooke was brought into the courtroom and the trial judge asked him if he wanted to return to the courtroom for the proceedings. Cooke answered that he wanted to be present and he wanted some of his questions answered by the witnesses from the previous day and he wanted to testify about those witnesses' testimony. The trial judge explained that Cooke's attorneys decide what questions to ask the witnesses. Cooke was frustrated that his attorneys were not asking the questions he wanted them to ask.

Cooke also seemed frustrated that he had spoken to the trial judge about his disagreement with his attorneys and the trial judge had not addressed his concerns. Cooke began to indicate that he believed he was representing himself. He wanted to testify again and address the rebuttal testimony, particularly Detective Rubin's testimony. He said: "I should be allowed to testify again on these matters. . . . I should be able to defend myself by doing that because they [defense counsel] are not defending me, period." Cooke also stated that if he could not testify and his attorneys would not ask the questions he wanted them to ask, he would choose not to be present because he could not guarantee that he would not have an outburst. Cooke said: "I would rather just be out while this is happening."

The trial judge honored Cooke's wishes and told him that he could continue to watch the proceedings from the holding cell while the state's rebuttal continued. The trial judge reserved his decision as to whether Cooke could take the stand again to address the rebuttal evidence. Cooke was escorted out of the courtroom. The State continued its rebuttal.

8. *Cooke Testifies Again.*

When the State concluded its rebuttal, the jury was excused and the trial judge brought in Cooke for another colloquy. Cooke said that he wanted to take the stand again to discuss the New Jersey home invasions and Dr. Mechanick's testimony, particularly what Cooke did and did not say to the doctor. The trial judge explained that Cooke could only talk about things that were brought up in the State's rebuttal and that if Cooke went beyond that and started talking about, among other things, "complaints about your lawyers or complaints about how your lawyers are handling this case versus how you wanted to handle the case," Cooke would have to leave the courtroom. The trial judge also reminded Cooke that if he testified again, his legs would be shackled, but the shackles would be concealed from the jurors. The trial judge explained that it was not in Cooke's best interest to tell the jurors he was shackled, like he did the last time he testified.

The trial judge asked if defense counsel wanted to speak and defense counsel stated:

> It is the advice that we have given Mr. Cooke that – understanding our differences in the trial strategies that we have pursued and that he wished us to pursue and recognizing those differences in opinion – it remains our advice to him that he is not best served by testifying. In other words, it is against the advice of his lawyers that he testify at this point.

The State continued to object to allowing Cooke another opportunity to testify, but the trial judge disagreed with the prosecutor's arguments. The trial judge concluded that he would permit Cooke to testify again. The trial judge also warned the prosecutor not to provoke Cooke during cross-examination. The trial judge said: "Honestly, I seriously had problems with your behavior last Thursday [when the defendant testified] and I'm telling you this now – I wish I had interceded further because I think some of it exacerbated a situation which you knew was going to be difficult as it is. I just don't want a repeat."

When the jury was brought back into the courtroom, Cooke was again seated at a special witness stand where his legs could be shackled but not visible to the jury. The trial judge said to Cooke: "You have indicated that you wish to address certain matters which came up in connection with the State's rebuttal evidence. You may now do so, sir."

Cooke began with the following: "First of all, I would like to talk about the incident from Atlantic City, one thing. Like I told you on Thursday, I'm

defending my own self. So I don't have to speak on that no more." Then Cooke talked about the New Jersey crimes and gave details about the crimes that were not in evidence. When the trial judge told Cooke he could only talk about things that were brought up in the State's rebuttal, Cooke said: "I need to let the jury know the truth. . . . I mean, you're trying to convince the jury like I'm a compulsive liar. But it seems to me the State is a hypocrite and not me because everything I said was true." The trial judge excused the jury and explained to Cooke that he was not following the rules and he was testifying about things that were not in evidence, and therefore, he lost his right to continue testifying. The trial judge said: "I'm going to stop this right now before it gets any worse." Cooke was removed from the courtroom.

After the jury was excused for the day, the trial judge ruled that, because of Cooke's conduct, he would not be permitted to return to the courtroom, "even during summation and charge." The trial judge was "concerned with any disruptions that may interrupt the flow of counsel or me in the arguments and charging the jury" and also noted that Cooke "still alludes to the dispute he has with his own counsel about the case." The trial judge was afraid that during the defense summation Cooke would interrupt in a way that would be more prejudicial to him than his absence from the proceedings would be. Therefore, Cooke would continue to watch the proceedings by television from the holding cell.

9. *Prayer Conference.*

The proceedings resumed with the prayer conference in the trial judge's chambers on March 2, 2007. The trial judge warned the defense counsel that defense counsel's statement in his opening, that there was no difference between "guilty but mentally ill" and "guilty" as far as the potential punishment, was not proper. The trial judge told defense counsel not to argue in summation that a verdict of guilty but mentally ill would not diminish the potential punishment Cooke would receive.[22] Defense counsel said that he would comply with the trial judge's order but would come as close to suggesting that as he possibly could.

10. *Closing Arguments.*

The parties gave their closing arguments on March 5, 2007. During the defense's closing, defense counsel told the jury that, although Cooke said he disagreed with his attorneys' approach and claimed he was not mentally ill, the jury should take that as evidence of his mental illness. Defense counsel said: "Mr. Cooke's testimony that he's not pursuing a claim of mental illness and that it's his lawyers that are doing it, that's true." Defense counsel explained that, even though "Mr. Cooke disagrees with his lawyers,"

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[22] While they were discussing an unrelated issue, the prosecution noted that there were "zero cases to tell you who gets to choose the mental illness defense, defense counsel or client."

it "does not diminish his claim of mental illness. It really reinforces it." Defense counsel continued:

> Mr. Cooke cannot or will not admit his mental illness, that's part of his pathology. And, in the context of this case, mental illness is not a defense, it's not an excuse, it's merely Mr. Cooke's mental status when he committed these crimes. And he committed these crimes, and you should find him guilty, guilty but mentally ill. We have all heard Mr. Cooke's statement, "I'm not guilty. I'm not mentally ill." With all due respect to Mr. Cooke, the evidence proves that he's wrong on both counts. But you are the judges of that, you'll consider all of the evidence and reach your verdict. I'm confident that you will find Mr. Cooke guilty but mentally ill on all the counts.[23]

In the State's closing, the prosecutor also remarked on Cooke's disagreement with his counsel. The prosecutor criticized the defense's argument that the jury should consider the fact that the defendant does not want to pursue a mental illness verdict as evidence of his mental illness. The prosecutor argued that whether Cooke wanted to pursue a mental illness verdict was irrelevant to whether or not he had a mental illness. The prosecutor urged the jury to find that

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[23] Defense counsel later summarized his closing argument as follows: "I stood in front of this jury and said, 'He's guilty,' and 'Just determine whether he's mentally ill or not.' "

Cooke did not have a mental illness and to simply find him guilty.

11. *The Jury's Verdict and the Penalty Phase.*

The trial judge stated that Cooke had a right to be present for the reading of the verdict, but the trial judge would have a colloquy with Cooke beforehand to remind Cooke to behave. During the colloquy, the trial judge told Cooke that he did not have a right to speak during the return of the verdict but if there was a verdict of guilty, Cooke could address the jury in the penalty phase. Cooke said that he would be quiet during the return of the verdict. The jury returned a verdict of guilty on all counts. Cooke remained quiet throughout the proceedings.

Despite failing to obtain a guilty but mentally ill verdict, during the penalty phase, counsel emphasized Cooke's mental state as a mitigating circumstance, along with his traumatic childhood, his learning disabilities, and the impact his execution would have on his family. The jury voted unanimously to recommend a sentence of death. In a June 6, 2007 opinion, the trial judge agreed with the jury's recommendation and sentenced Cooke to death.[24] Trial counsel filed a timely notice of appeal and moved to withdraw and/or for the appointment of independent counsel. We

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[24] *State v. Cooke*, 2007 WL 2129018 (Del.Super.Ct. June 6, 2007).

granted the motion and appointed the present appellate counsel.

III. Cooke's Sixth Amendment Claim

Cooke contends that the Superior Court deprived him of his Sixth Amendment rights guaranteed by the United States Constitution when it: (1) permitted his defense attorneys to present evidence and argue to the jury that he was "guilty but mentally ill" over his express and repeated objections; and (2) failed to sufficiently and timely inquire into his dispute with his defense attorneys about their decision to pursue a verdict of "guilty but mentally ill."[25] We review claims of violations of constitutional rights *de novo*.[26]

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."[27] The United

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[25] Because the Sixth Amendment requires reversal in this case, we do not address Cooke's claim under Article I, Section 7 of the Delaware Constitution.

[26] *Norman v. State*, 976 A.2d 843, ___, 2009 WL 1676828, at *8 (Del.2009); *Weber v. State*, 971 A.2d 135, 141 (Del.2009); *Capano v. State*, 781 A.2d 556, 607 (Del.2001).

[27] U.S. CONST. amend. VI; *see Johnson v. Zerbst*, 304 U.S. 458, 463, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (holding that the Sixth Amendment right to counsel in criminal proceedings applies in federal courts); *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (holding that the Sixth Amendment right to counsel in criminal proceedings applies to states through the Fourteenth Amendment); *see Kimmelman v.*

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States Supreme Court has long held that "the right to counsel is the right to the effective assistance of counsel."[28] The purpose of this right is to "ensure a fair trial" and "ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."[29] Accordingly, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[30]

A. *Defense counsel's decision to pursue a verdict of guilty but mentally ill violated Cooke's constitutional rights.*

When a defendant is represented by counsel, the authority to manage the day-to-day conduct of the

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Morrison, 477 U.S. 365, 380, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) (explaining that the constitutional right to counsel is not "conditioned upon actual innocence," but rather is "granted to the innocent and the guilty alike").

[28] *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *see, e.g., Reece v. Georgia*, 350 U.S. 85, 90, 76 S.Ct. 167, 100 L.Ed. 77 (1955); *Glasser v. United States*, 315 U.S. 60, 69-70, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Avery v. Alabama*, 308 U.S. 444, 445, 60 S.Ct. 321, 84 L.Ed. 377 (1940); *Powell v. Alabama*, 287 U.S. 45, 57, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

[29] *Strickland v. Washington*, 466 U.S. 668, 686, 691-92, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

[30] *Strickland*, at 686, 104 S.Ct. 2052

defense rests with the attorney.[31] Specifically, the defense attorney "has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop."[32] In addition to shouldering these tactical decisions, representation of a criminal defendant entails certain basic duties.

> Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.[33]

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[31] *New York v. Hill*, 528 U.S. 110, 114-15, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000); *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988); *Wainwright v. Sykes*, 433 U.S. 72, 93, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (Burger, C.J., concurring); *accord In re Petition of State for a Writ of Mandamus*, 918 A.2d 1151, 1154 (Del.2007).

[32] *Wainwright*, 433 U.S. at 93, 97 S.Ct. 2497; *accord In re Petition of State*, 918 A.2d at 1155; *see also Strickland*, at 690, 104 S.Ct. 2052 (explaining that "strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable").

[33] *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 346, 100 S.Ct. 1708, 64 L.Ed.2d 333

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The defense attorney's duty to consult with the defendant regarding "important decisions" does not require counsel to obtain the defendant's consent to "every tactical decision."[34] However, certain decisions regarding the exercise or waiver of basic trial and appellate rights are so personal to the defendant "that they cannot be made for the defendant by a surrogate."[35] In *Jones v. Barnes,*[36] the United States

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(1980); *Powell,* 287 U.S. at 68-69, 53 S.Ct. 55); *see also Faretta v. California,* 422 U.S. 806, 820, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) (explaining that "however expert, [a defense lawyer] is still an assistant" and not a "master" because otherwise "the right to make a defense [would be] stripped of the personal character upon which the [Constitution] insists."); *cf.* DEL. LAWYERS' RULES OF PROF'L CONDUCT R. 1.4(a)(1) ("A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16, cmt. c (2000).

[34] *Florida v. Nixon,* 543 U.S. 175, 187, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) (citing *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052; *Taylor,* 484 U.S. at 417-18, 108 S.Ct. 646).

[35] *Nixon,* 543 U.S. at 187, 125 S.Ct. 551; *see also Faretta,* 422 U.S. at 819-20, 95 S.Ct. 2525 (explaining that the Sixth Amendment provides an "implied" right "to defend [that] is given directly to the accused; for it is he who suffers the consequences if the defense fails.").

[36] 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); *see also Nixon,* 543 U.S. at 187, 125 S.Ct. 551; *Wainwright,* 433 U.S. at 93 n. 1, 97 S.Ct. 2497; *accord In re Petition of State,* 918 A.2d at 1154. In *Jones,* the Court recognized that this principle was embodied in the then-proposed Model Rules of Professional Conduct Rule 1.2(a) (Final Draft 1982), which provides: "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the

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Supreme Court recognized that a criminal defendant has "ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Such choices "implicate inherently personal rights which would call into question the fundamental fairness of the trial if made by anyone other than the defendant."[37] Therefore, as to these decisions on the objectives of the representation, a lawyer "must both consult with the defendant *and* obtain consent to the recommended course of action."[38] These rights cannot be waived by counsel without the defendant's fully-informed and publicly-acknowledged consent.[39]

Accordingly, the defendant has autonomy to make the most basic decisions affecting his case, including whether to plead not guilty and have a trial by jury where he has an opportunity to confront and

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means by which they are to be pursued. . . . In a criminal case, the lawyer shall abide by the client's decision . . . *as to the plea to be entered, whether to waive jury trial and whether the client will testify.*" 463 U.S. at 753 n. 6, 103 S.Ct. 3308; *cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22(1).

[37] *Arko v. People*, 183 P.3d 555, 558 (Colo.2008); *see also Gonzalez v. United States*, ___ U.S. ___, 128 S.Ct. 1765, 1771, 170 L.Ed.2d 616 (2008) ("[S]ome basic trial choices are so important that an attorney must seek the client's consent in order to waive the right.") (citing *Nixon*, 543 U.S. at 187, 125 S.Ct. 551).

[38] *Nixon*, 543 U.S. at 187, 125 S.Ct. 551 (emphasis added).

[39] *See Taylor*, 484 U.S. at 417-18, 108 S.Ct. 646; *Brookhart v. Janis*, 384 U.S. 1, 7-8, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966).

cross-examine adverse witnesses, and whether to testify.[40] Although these fundamental decisions are indeed strategic choices that counsel might be better able to make, because the consequences of them are the defendant's alone, they are too important to be made by anyone else.[41] Moreover, counsel cannot undermine the defendant's right to make these personal and fundamental decisions by ignoring the defendant's choice and arguing affirmatively against the defendant's chosen objective.[42] Here, defense counsel pursued a "guilty but mentally ill" verdict over Cooke's vociferous and repeated protestations that he was completely innocent and not mentally ill. This strategy deprived Cooke of his constitutional right to make the fundamental decisions regarding his case.

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[40] *See Boykin v. Alabama,* 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) (right to plead not guilty); *Duncan v. Louisiana,* 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (right to trial by jury); *Pointer v. Texas,* 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (right to confront witnesses); *Malloy v. Hogan,* 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) (right to not testify).

[41] *See Faretta,* 422 U.S. at 819-20, 95 S.Ct. 2525; *Brookhart,* 384 U.S. at 7-8, 86 S.Ct. 1245.

[42] This rule is consistent with, although not controlled by, Rule 1.2(a) of the Model Rules of Professional Conduct, Rule 1.2(a) of the Delaware Lawyer's Rules of Professional Conduct, and the Restatement (Third) of the Law Governing Lawyers § 22(1) cmt. b, d.

1. *Defense counsel infringed Cooke's right to plead not guilty.*

One of the fundamental decisions reserved for the defendant alone to make is the plea decision.[43] In Delaware, "[a] defendant may plead not guilty, guilty, nolo contendere, or guilty but mentally ill."[44] A defendant may also raise the "defense" of "guilty but mentally ill" at trial.[45] In this case, Cooke was competent to stand trial and chose the alternative of a plea of not guilty over a plea of guilty but mentally ill.[46] Nevertheless, Cooke's attorneys decided to override Cooke's choice and advised the trial judge that they would ask the jury, over Cooke's objection, to find Cooke guilty but mentally ill.

In a pretrial conference, the defense attorneys told the trial judge that the conflict between their objective and Cooke's objective might result in

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[43] *Gonzalez*, 128 S.Ct. at 1769 (explaining right to plead not guilty is a fundamental right that defendant must waive personally and attorney alone cannot waive).

[44] SUPER. CT.CRIM. R. 11(a).

[45] *See* 11 *Del. C.* § 408.

[46] In *Indiana v. Edwards*, ___ U.S. ___, 128 S.Ct. 2379, 2387-88, 171 L.Ed.2d 345 (2008), the United States Supreme Court recognized that defendants could be competent to stand trial, but not sufficiently competent to represent themselves. The Court held that the Sixth Amendment right to self-representation did not prohibit States from insisting on counsel when defendants were not competent to conduct trial proceedings themselves. Here, there is no indication that Cooke was not sufficiently competent to make decisions about his case.

disastrous consequences before the jury. The judge was concerned about the propriety of the defense attorneys pursuing an objective that was inconsistent with Cooke's objective. The trial judge stated: "I don't know how you can argue something that has the word 'guilty' in it when the defendant doesn't want you to, because it's guilty as charged, not guilty of the lesser-included offense." Yet, the record reflects that defense counsel did so without the trial judge ever attempting to address the rift counsel described as an impending disaster.

In their opening statement, Cooke's defense attorneys gave no support for Cooke's desire to plead not guilty. Instead, they told the jury they would introduce evidence that Cooke was "guilty but mentally ill." Later, in presenting that mental illness evidence during trial, Cooke's defense attorneys introduced a confession which he disputed. Then, in their closing argument to the jury, Cooke's defense attorneys asked the jury to reject Cooke's plea of not guilty because "he committed" the crimes with which he was charged. They did not ask the jury to consider Cooke's objective of being found not guilty, but instead asked the jury to agree with their objective by finding Cooke guilty but mentally ill.

The defense attorneys told the trial judge that they saw no problem with Cooke entering a not guilty plea and asserting his innocence while they argued to the jury that he was guilty but mentally ill. We find two problems with that course of conduct. First, Cooke did not have the "assistance" of counsel in

pursuing his chosen objective for the trial – obtaining a not guilty verdict.[47] Second, Cooke was denied the benefit of the reasonable doubt standard and meaningful adversarial testing of the prosecution's case.[48] Consequently, Cooke's fundamental right to enter a plea of not guilty was effectively negated by the conflicting objective of his defense attorneys to have the jury find him guilty but mentally ill.[49]

2. *Defense counsel negated Cooke's right to testify in his own defense.*

A second fundamental decision reserved for the defendant alone to make is the decision to testify.[50]

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[47] *Cronic,* 466 U.S. at 656, 104 S.Ct. 2039 ("[T]he adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate.") (citations omitted).

[48] *Id.* ("The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."); *see also Weber,* 971 A.2d at 142-43 (stating that the trial judge has an obligation to ensure "that the jury will accord the defendant the full benefit of the reasonable doubt standard").

[49] *Nixon,* 543 U.S. at 187, 125 S.Ct. 551 (citing *Jones,* 463 U.S. at 751, 103 S.Ct. 3308; *Brookhart,* 384 U.S. at 6-7, 86 S.Ct. 1245); *see Gonzalez,* 128 S.Ct. at 1769 (citing *Brookhart,* 384 U.S. at 7-8, 86 S.Ct. 1245).

[50] *Riggins v. Nevada,* 504 U.S. 127, 144, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) ("It is well established that the defendant has the right to testify in his own behalf, a right we have found essential to our adversary system.") (citing *In re Oliver,* 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948)).

Cooke wanted to exercise his right to testify in his own defense, but his attorneys refused to call him as a witness because they believed that he would assert his innocence, contradicting counsel's position that Cooke was guilty of the crimes charged. They explained that Cooke's assertion of factual innocence would not be perjury because Cooke believed he was innocent.[51] The defense attorneys then told the trial judge, who would make the final decision on whether to sentence Cooke to life or death, that they believed Cooke had committed the crimes and was guilty but mentally ill. Ultimately, the trial judge called Cooke to testify because his defense attorneys refused to do so.

Cooke testified that he did not agree with his attorneys' guilty but mentally ill strategy and that he was "on his own" for representation. Cooke denied committing the crimes in an effort to realize his trial objective of being found not guilty. In an effort to realize their independent trial objective of having the jury return a verdict of guilty but mentally ill,

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[51] Counsel apparently recognized that to be guilty of perjury, a person must "swear falsely." *See* 11 *Del. C.* § 1223. "A person 'swears falsely' when the person intentionally makes a false statement or affirms the truth of a false statement previously made, knowing it to be false or not believing it to be true, while giving testimony or under oath in a written statement." 11 *Del. C.* § 1224; *see also Nix v. Whiteside,* 475 U.S. 157, 171, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) (holding that the right to the effective assistance of counsel is not violated when an attorney refuses to assist the defendant in presenting perjured testimony).

Cooke's defense attorneys completely negated Cooke's objective of having the jury find him not guilty by introducing into evidence – without seeking Cooke's waiver of the psychotherapist-patient privilege[52] – a confession which Cooke denied making. Cooke's attorneys also attempted to ask Cooke's pastor, on direct examination, whether Cooke had confessed, but Cooke refused to waive his right to protect the privileged communication.[53] That exchange on the record illustrates the magnitude of the conflict between Cooke and his attorneys.

The prosecution recognized that the question of Cooke's innocence was no longer an issue after the defense attorneys introduced Cooke's disputed statements to Dr. Turner. The prosecutor said: "I would ask your Honor to consider the shifting landscape as

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[52] *See* DEL. R. EVID. 503 (mental health provider, physician, and psychotherapist-patient privilege) (providing for a privilege that allows the patient to refuse to disclose confidential communications made to a mental health provider for the purpose of diagnosis or treatment unless, among other exceptions, the communication is relevant to an issue of the mental or emotional condition of the patient used as an element of a claim or defense in any proceeding).

[53] *See* DEL. R. EVID. 505 (religious privilege) (providing for a privilege that allows a person to refuse to disclose, and to prevent another from disclosing, a confidential communication by the person to a clergyman in his capacity as a spiritual advisor). For undisclosed reasons, defense counsel believed that Cooke had confessed to his pastor that he killed Lindsey Bonistall; however, the record does not indicate whether or not Cooke acknowledged any such confession.

of today; to wit, Cooke's confession is now in evidence." In response to an argument about prejudice from the introduction of "other crimes," the prosecutor said: "That issue is dead and gone now because Cooke has admitted at least that crime, that Bonistall burglary, rape and homicide. What's at issue in this case now, and really it's been an issue in the case first and foremost since [defense counsel's] wonderful opening statement, is Cooke's mental state." Consequently, Cooke's fundamental right to testify in his own defense was effectively negated by the objective of his defense attorneys to have the jury find him guilty but mentally ill.[54]

3. *Defense counsel deprived Cooke of the right to an impartial jury trial.*

A third fundamental decision reserved for the defendant alone to make is the decision to have a jury trial.[55] Cooke's defense attorneys compromised the impartiality of his jury, starting with their opening

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[54] *Nixon*, 543 U.S. at 187, 125 S.Ct. 551 (citing *Jones*, 463 U.S. at 751, 103 S.Ct. 3308); *see Riggins*, 504 U.S. at 145, 112 S.Ct. 1810 (explaining that preventing a defendant from exercising his constitutional right to take the stand in his own defense "would contradict not only the right of the accused to conduct her own defense, but also her right to make this defense in person" and "in his or her own words") (citing *Rock v. Arkansas*, 483 U.S. 44, 52-53, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)).

[55] *Nixon*, 543 U.S. at 187, 125 S.Ct. 551 (citing *Jones*, 463 U.S. at 751, 103 S.Ct. 3308); *Boykin*, 395 U.S. at 243, 89 S.Ct. 1709; *Duncan*, 391 U.S. at 148-49, 88 S.Ct. 1444.

statement, in which they told the jury – against Cooke's wishes – that Cooke was guilty but mentally ill. The record reflects frequent exchanges between the trial judge, the defense attorneys, and the State about the fear that Cooke would react adversely in front of the jury about the conflict between him and his attorneys over the objective of Cooke's trial.

Although the trial judge met with Cooke and all of the attorneys in a separate courtroom after the opening statements, the trial proceeded without the conflict in objectives being either addressed or resolved. This resulted in the frequent outbursts in front of the jury that defense counsel had predicted. Not only did Cooke testify about his dispute with his defense attorneys about the guilty but mentally ill objective, but on two separate occasions his outbursts on the subject resulted in his attorneys moving for a mistrial, because Cooke's assertion that he was "not guilty" was "highly prejudicial to the defense that *we're* putting on."

The record reflects that Cooke's right to a jury trial was also compromised by his exclusion from the courtroom at the request of his counsel.[56] Although

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[56] *Nixon*, 543 U.S. at 187, 125 S.Ct. 551 (explaining that the right to trial by jury and the right to confront one's accusers are "constitutional rights that inhere in a criminal trial") (citing *Boykin*, 395 U.S. at 243, 89 S.Ct. 1709); *United States v. Ruiz*, 536 U.S. 622, 629, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002) (explaining that "other accompanying constitutional guarantees" to the right to a fair trial include the Sixth Amendment right to confront one's accusers and right to trial by jury); *Maryland v.*

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Cooke was removed from the courtroom for outbursts about the conduct of his defense attorneys generally and specifically on occasions when evidence to support the guilty but mentally ill objective was presented, at other times, Cooke's defense attorneys told the judge it would be better for Cooke not to be in the courtroom when they presented the mental illness evidence to the jury over Cooke's objection. Accordingly, despite Cooke's request for a jury trial, the objective of his defense attorneys led to their asking for his exclusion from the courtroom while they presented either evidence or argument that Cooke opposed.

The denial of Cooke's right to a fair trial by an impartial jury on the issue of his guilt is apparent from his defense attorneys' closing argument, during which they told the jury that Cooke's testimony about his innocence was not credible and should not be believed because it was a manifestation of his mental illness. They also told the jury that Cooke committed the crimes with which he was charged. The defense

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Craig, 497 U.S. 836, 849-50, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (explaining that "face-to-face confrontation with witnesses appearing at trial" is important though not "an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers"). *But see Illinois v. Allen*, 397 U.S. 337, 342-43, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (explaining that the constitutional right to be present at trial was not violated where the trial judge removed the defendant for disruptive behavior).

attorneys then asked the jury to find Cooke guilty but mentally ill.

Moreover, by pursuing the objective of obtaining a guilty but mentally ill verdict during the guilt phase, the defense also compromised the impartiality of Cooke's jury during its *penalty phase* consideration of the statutory aggravating factors that would make Cooke death eligible. Defense counsel hoped that a guilty but mentally ill verdict would give Cooke the advantage of a mental illness mitigating factor as a matter of law during the penalty phase. However, by asking the jury to find Cooke guilty but mentally ill, as charged, defense counsel also asked the jury to find Cooke guilty of all the felonies that established statutory aggravating circumstances as a matter of law.[57] Cooke's assertion of factual innocence disputed not only his guilt, but also his eligibility for the death penalty. His own attorneys affirmatively opposed his assertion of innocence by contending he committed the crimes charged and that his testimony asserting innocence demonstrated mental illness. As result, Cooke's fundamental right to have an impartial jury during both the guilt and the penalty phases was effectively negated by the objective of his defense attorneys to have the jury find him guilty but mentally ill.[58]

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[57] *See Steckel v. State*, 711 A.2d 5, 13 (Del.1998).

[58] *Nixon*, 543 U.S. at 187, 125 S.Ct. 551 (citing *Jones*, 463 U.S. at 751, 103 S.Ct. 3308).

4. Florida v. Nixon *does not mandate application of* Strickland *because Cooke adamantly opposed counsel's course of conduct.*

In *Florida v. Nixon,*[59] the United States Supreme Court explained that, although defense counsel is obligated to discuss potential strategies with the defendant, "when counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest *and the defendant is unresponsive,* counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." In that case, defense counsel decided that the best strategy was to concede that the defendant had committed murder in the guilt phase of the capital trial, and to concentrate on attempting to spare the defendant's life in the penalty phase. Counsel consulted with and informed the defendant that the strategy was the best way to attempt to avoid a death sentence. The defendant did not respond affirmatively or negatively, and so counsel proceeded with that strategy without the defendant's express consent.[60]

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[59] 543 U.S. 175, 192, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) (citing *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052) (emphasis added).

[60] *Id.* at 186-87, 125 S.Ct. 551. Counsel explained his strategy to the defendant several times and the defendant "did nothing affirmative or negative." *Id.* at 186, 125 S.Ct. 551. Because he could not elicit a definitive response from the defendant, counsel "chose to pursue the concession strategy because,

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The United States Supreme Court explained that, when a defendant fails to give "express consent" to pursue "a tenable strategy [that] counsel has adequately disclosed to and discussed with the defendant," prejudice is not presumed.[61] Instead, "[t]he reasonableness of counsel's performance, *after consultation with the defendant yields no response,* must be judged in accord with the inquiry generally applicable to ineffective-assistance-of-counsel claims," that is, whether counsel's representation "fell below an objective standard of reasonableness."[62] The court explained that a presumption of prejudice "is not in order based *solely* on a defendant's failure to provide express consent to a tenable strategy counsel has adequately disclosed to and discussed with the defendant."[63]

This case is not like *Nixon,* where the defendant did not respond to counsel's proposed strategy, and neither consented nor objected when his counsel pursued that strategy at trial. In stark contrast to the defendant's silence in that case, Cooke repeatedly objected to his counsel's objective of obtaining a verdict

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in his professional judgment, it appeared to be the only way to save the defendant's life." *Id.*

[61] *Id.* at 179, 125 S.Ct. 551 (citing *Cronic,* 466 U.S. at 659, 104 S.Ct. 2039).

[62] *Id.* at 178, 125 S.Ct. 551 (citing *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052) (emphasis added).

[63] *Id.* at 179, 125 S.Ct. 551 (citing *Cronic,* 466 U.S. at 659, 104 S.Ct. 2039) (emphasis added).

of guilty but mentally ill, and asserted his factual innocence consistent with his plea of not guilty.[64] The Court's holding in *Nixon* that counsel was not required to acquire the defendant's "affirmative, explicit acceptance" to a tactical decision to concede guilt, was expressly qualified as applying only to the factual scenario in which the defendant is unresponsive to counsel's proposed strategy.[65] However, where, as here, the defendant *adamantly objects* to counsel's proposed objective to concede guilt and pursue a verdict of guilty but mentally ill, and counsel proceeds with that objective anyway, the defendant is effectively deprived of his constitutional right to decide personally whether to plead guilty to the prosecution's case, to testify in his own defense, and to have a

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[64] We note that a hypothetical was presented during oral argument in *Nixon* with a striking similarity to the facts before us. Justice Souter presented counsel for the United States (as amicus curiae supporting the state of Florida) with a hypothetical defendant who "goes whole hog" in announcing to the jury and the trial judge that he disagrees with his counsel's decision to concede guilt and that he is innocent. Counsel responded that, under those circumstances, alternative counsel should be appointed. Justice Souter agreed, but further inquired whether, if no alternative counsel is appointed, "there is any possibility . . . of finding adequacy of counsel?" Counsel responded "Probably not. . . ." and conceded that this type of situation would "lead to such a breakdown in the attorney-client relationship that [the attorney] couldn't possibly render effective assistance of counsel." Transcript of Oral Argument at 22-23, *Nixon*, 543 U.S. 175, 125 S.Ct. 551 (No. 03-931).

[65] *Nixon*, 543 U.S. at 192, 125 S.Ct. 551.

trial by an impartial jury.[66] The right to make these decisions is nullified if counsel can override them against the defendant's wishes. In this case, the trial court's failure to address the breakdown in the attorney-client relationship allowed defense counsel to proceed with a trial objective that Cooke expressly opposed. This deprived Cooke of his Sixth Amendment right to make fundamental decisions concerning his case.[67]

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[66] *Cf.* Kimberly Helene Zelnick, *In Gideon's Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion,* 30 AM. J.CRIM. L. 363, 397-98 (2003) ("Because these rights [enumerated in *Jones*'] are retained for the defendant, counsel should be bound by his client's decisions regarding how he wishes to exercise these rights, and further, counsel should be bound to act in a fashion that is consistent with those decisions."); Peter A. Joy & Kevin C. McMunigal, *Counsel or Client – Who's in Charge?,* 22 Crim. Justice 34, 36 (2008) (explaining that *Nixon* exemplifies a judicial trend that "courts tend to interpret a defendant's silence after consultation with defense counsel as acquiescence to defense counsel's advice or action even when the action may waive a defendant's fundamental right").

[67] *See Faretta,* 422 U.S. at 819-20, 95 S.Ct. 2525 (explaining that the Sixth Amendment "grants to the accused personally the right to make his defense"); *see also* 1 GEOFFREY C. HAZARD JR. & C. WILLIAM HODES, THE LAW OF LAWYERING § 5.6, illus. 5-3 (3d ed. 2009) (explaining that a criminal defense lawyer who interferes with a client's autonomous choice in the area of critical turning-point decisions is not providing the effective assistance of counsel required by the Sixth Amendment); Joy & McMunigal, *supra* note 66 at 35-36 (noting that some courts have used the *Faretta* holding "as grounds for concluding that the client's right to decide the objectives of representation includes the defenses to be raised and whether

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B. *Cooke was denied the assistance of counsel in his defense.*

Generally, we do not consider claims of ineffective assistance of counsel in a direct appeal.[68] The reason for that practice, in part, is to develop a record on that issue in a Superior Court Rule 61 post-conviction proceeding. In Cooke's case, however, the actions of trial counsel are not disputed and are clearly reflected in the Superior Court proceedings.[69] Therefore, the present record is sufficient for this Court to review Cooke's constitutional claims, including the argument that he was denied his Sixth Amendment right to the effective assistance of counsel.[70]

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mitigation evidence should be introduced") (citing *State v. Hedges,* 269 Kan. 895, 8 P.3d 1259, 1273-74 (2000); *Pruitt v. State,* 270 Ga. 745, 514 S.E.2d 639, 650 (1999); *People v. Frierson,* 39 Cal.3d 803, 218 Cal.Rptr. 73, 705 P.2d 396, 403-04 (1985)).

[68] *See, e.g., Desmond v. State,* 654 A.2d 821, 829 (Del.1994); *Wright v. State,* 513 A.2d 1310, 1315 (Del.1986); *Duross v. State,* 494 A.2d 1265, 1269 (Del.1985); *accord* SUPR. CT. R.. 8.

[69] *See State v. Carter,* 270 Kan. 426, 14 P.3d 1138, 1144 (2000) (explaining that the Supreme Court of Kansas generally does not consider a defendant's assertion of ineffective assistance of counsel before the trial court has had an opportunity to assess counsel's performance, but that such assessment by the trial court is not necessary if the record on appeal is sufficiently complete to decide the issue on direct appeal and it would serve no purpose to remand); *see also United States v. Swanson,* 943 F.2d 1070, 1072-73 (9th Cir.1991).

[70] *Carter,* 14 P.3d at 1144 (stating that "[t]he record on appeal is sufficient for this court to consider [the defendant's]

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To prevail on a claim of ineffective assistance of counsel, a defendant must typically satisfy the two-pronged test set out in *Strickland v. Washington.*[71] First, counsel's performance must have been deficient, meaning that "counsel's representation fell below an objective standard of reasonableness."[72] Second, if counsel was deficient, there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[73] However, in *United States v. Cronic,*[74] a companion case to *Strickland,* the United States Supreme Court held that there are three scenarios in which the defendant need not satisfy the *Strickland* test, because prejudice is presumed: (1) where there is a complete denial of counsel; (2) where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) where counsel is asked to provide assistance in circumstances where competent counsel likely could not. The second circumstance applies in this case.

In *Cronic,* the Court explained what it considered to be "meaningful adversarial testing":

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constitutional claims, including ineffective assistance of counsel").

[71] 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[72] *Id.* at 688, 104 S.Ct. 2052.

[73] *Id.* at 694, 104 S.Ct. 2052.

[74] 466 U.S. 648, 659-62, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

> The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted . . . the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.[75]

The Court further explained the defendant must show either the deprivation of a constitutional right "of the first magnitude" or "specific errors of counsel [that] undermined the reliability of the finding of guilt."[76]

The United States Supreme Court elaborated on *Cronic's* second exception more recently in *Bell v. Cone*.[77] In that case, the defendant's attorney failed to call witnesses, present available mitigating evidence, or make a closing argument during the penalty phase of the trial, although he did make an opening

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[75] *Id.* at 656-57, 104 S.Ct. 2039 (quoting *Anders v. California*, 386 U.S. 738, 743, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)); *see also Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 2556, 174 L.Ed.2d 314 (2009) (Kennedy J., dissenting).

[76] *Id.* at 659 & n. 26, 104 S.Ct. 2039.

[77] 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

statement and cross-examine witnesses. The Court explained that in order to "presume[e] prejudice based on an attorney's failure to test the prosecutor's case . . . the attorney's failure must be complete."[78] The Court further explained that in "distinguishing between the rule of *Strickland* and that of *Cronic,* [the] difference is not of degree but of kind," and that this distinction hinges on whether the petitioner alleges a defect in the "proceeding as a whole" or "at specific points" of the trial.[79] Noting that the defendant had alleged only that his counsel failed to introduce certain evidence and waived a closing argument, the Court held that these challenges were "plainly of the same ilk as other specific attorney errors we have held subject to *Strickland's* performance and prejudice components."[80]

In this case, when Cooke exercised his ultimate authority to make certain fundamental decisions, his attorneys insisted on their own objective. The enormity of this conflict was accurately summarized by defense counsel during an exchange with the trial judge. They explained that Cooke had been nice and congenial in conversations with his attorneys, *"but in terms of where the two ships are sailing in this litigation, they're not on the same course."* Cooke's overarching strategy was to obtain a verdict of not

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[78] *Id.* at 696-97, 122 S.Ct. 1843 (citing *Cronic,* 466 U.S. at 659, 104 S.Ct. 2039).

[79] *Id.* at 697, 122 S.Ct. 1843.

[80] *Id.* at 697-98, 122 S.Ct. 1843.

guilty by presenting evidence that he was factually innocent. Defense counsel had an independent and inconsistent strategy: to obtain a verdict of guilty but mentally ill by conceding Cooke's guilt and introducing evidence of his mental illness during the guilt/innocence phase of the trial. Counsel's override negated Cooke's decisions regarding his constitutional rights, and created a structural defect in the proceedings as a whole.

Unlike the specific allegations at issue in *Cone,* the record in this case demonstrates to us a two-fold breakdown in the adversarial system of justice that pervaded Cooke's entire proceeding.[81] First, Cooke's attorneys did not "assist" Cooke with his trial objective of obtaining a not guilty verdict.[82] Second, in pursuing their own inconsistent objective of proving that Cooke was guilty but mentally ill, defense counsel not only failed to subject the prosecution's case to meaningful adversarial testing, but also undermined the due process requirement that the State prove Cooke's guilt – and his eligibility for the death penalty – beyond a reasonable doubt.[83] The defense attorneys introduced Cooke's confession to Dr. Turner, argued to the jury that Cooke's testimony was not credible, and told the sentencing judge and the jury

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[81] *Swanson,* 943 F.2d at 1072-73; *see also Cronic,* 466 U.S. at 656-59, 104 S.Ct. 2039.

[82] *Cronic,* 466 U.S. at 659, 104 S.Ct. 2039.

[83] *Id.* at 654 n. 8, 104 S.Ct. 2039 (quoting *Powell,* 287 U.S. at 68-69, 53 S.Ct. 55).

that Cooke committed the crimes. Thus, on the issues of his guilt and his eligibility for a death sentence – the elements of capital murder – Cooke's defense attorneys' alignment with the prosecutors was complete.[84] Indeed, Cooke's attorneys helped the prosecution by introducing evidence against Cooke that was beyond the reach of the prosecutors.

"The assistance of counsel is among those constitutional rights so basic to a fair trial that their denial can never be treated as harmless error."[85] The conduct of Cooke's defense attorneys was inherently prejudicial and does not require a separate showing of prejudice, because Cooke's counsel negated his basic trial rights and "failed to function in any meaningful sense as the [prosecution's] adversary."[86] Although done in good faith, defense counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having

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[84] *Carter,* 14 P.3d at 1146 (quoting *Swanson,* 943 F.2d at 1071 (concluding that "we must reverse because counsel's abandonment of his client's defense [by conceding the only disputed facts in closing argument] caused a breakdown in our adversarial system of justice")).

[85] *Id.* at 1148 (quoting *State v. Jenkins,* 257 Kan. 1074, 898 P.2d 1121, 1127-28 (1995)).

[86] *Cronic,* 466 U.S. at 666, 104 S.Ct. 2039; *Carter,* 14 P.3d at 1145 (citing *Cronic,* 466 U.S. at 666, 104 S.Ct. 2039); *see* Zelnick, *supra* note 66, at 395-97 (advocating application of *Cronic* "when counsel overrides a defendant's decision regarding how the defendant wishes to exercise his personal constitutional rights, counsel has ceased to function as his client's advocate, and the bargain struck by the *Jones* Court has been corrupted.").

produced a just result. Accordingly, we find no other alternative except to grant Cooke a new trial.

C. *The trial court had a duty to inquire into the propriety of the representation.*

Every criminal defendant is presumed to be innocent and is entitled to a fair trial.[87] The trial judge has a duty to see that a defendant is "denied no necessary incident of a fair trial."[88] This includes ensuring "that the jury will accord the defendant the full benefit of the reasonable doubt standard."[89] By refusing to address Cooke's express opposition to his counsel's pursuit of a guilty but mentally ill verdict, the trial court failed to protect Cooke's right to a fair trial.[90]

The decision to pursue a verdict of not guilty and assert his factual innocence belongs to the

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[87] *Powell*, 287 U.S. at 58, 53 S.Ct. 55.

[88] *Id.* ("However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial.").

[89] *Weber*, 971 A.2d at 142-43; (holding that the trial judge committed reversible error when he refused the defendant's request for an instruction on a lesser-included offense that was merit ed [sic] by the evidence, because the defendant was denied "the full benefit of the reasonable doubt standard") (quoting *Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)).

[90] *See Cuyler*, 446 U.S. at 336, 100 S.Ct. 1708.

defendant.[91] The record before us reflects that Cooke was deprived of the opportunity to meaningfully oppose the prosecution's case.[92] His counsel's strategy to pursue a verdict of guilty but mentally ill, which included introducing a confession Cooke disputed, undermined Cooke's right to plead not guilty, to testify at trial and assert his innocence, and to present his chosen plea to the jury.[93] We have previously concluded that this strategy constituted attorney error which effectively denied Cooke the assistance of counsel and his fundamental trial rights.[94] The trial judge also erred by failing to intervene and provide a

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[91] *Cf. Red Dog v. State*, 620 A.2d 848, 853-54 (Del.1993). In *Red Dog*, the defendant sought to obtain an execution without any contest; however, his defense attorneys filed a motion to stay the execution over the defendant's repeated and consistent objections. We held that, absent a showing of the defendant's incompetence, the public defenders did not have standing to file such a motion "in derogation of his express directions to the contrary." *Id.* To the extent the dissent argues that *Red Dog* is inapposite because it concerned a defendant's right to take or refuse to take an appeal, we note that the decision whether to file an appeal, like the decision to plead guilty, waive a jury, or testify in his or her own behalf, is a fundamental decision reserved for the defendant. *See Jones*, 463 U.S. at 751, 103 S.Ct. 3308; *see also Nixon*, 543 U.S. at 187, 125 S.Ct. 551; *Wainwright*, 433 U.S. at 93 n. 1, 97 S.Ct. 2497; *accord In re Petition of State*, 918 A.2d at 1154.

[92] *Cronic*, 466 U.S. at 659, 104 S.Ct. 2039.

[93] *Nixon*, 543 U.S. at 187, 125 S.Ct. 551.

[94] *Id.*; *Cronic*, 466 U.S. at 656, 104 S.Ct. 2039.

remedy for this error, notwithstanding Cooke's explicit requests.[95]

Even though the trial court knew that Cooke had entered a plea of not guilty, opposed the guilty but mentally ill strategy, and wanted to testify that he was innocent so that he could receive the full benefit of the reasonable doubt standard in a trial by a jury, the trial court permitted defense counsel to seek a verdict of guilty but mentally ill, introduce Cooke's disputed confession, and concede Cooke's guilt to the jury, so that the only jury issue was whether Cooke was mentally ill. The inherent prejudice to Cooke, and defense counsel's prediction of a "disastrous happening" as a result of their conflict with Cooke, required intervention by the trial court.

Defense counsel's strategy, and the trial court's refusal to address their conflict with Cooke, resulted in "complete chaos at trial."[96] Cooke's counsel sat at one side of the defense table, arguing that Cooke was

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[95] *See Faretta,* 422 U.S. at 848, 95 S.Ct. 2525 (Blackmun, J., with Burger, C.J., and Rehnquist, J., dissenting) (arguing against the majority's holding that the Sixth Amendment guarantees an absolute right to self-representation by explaining that "[t]his is not a case where defense counsel, *against the wishes of the defendant* or with inadequate consultation, has adopted a trial strategy that significantly affects one of the accused's constitutional rights. For such overbearing conduct by counsel, there is a remedy.").

[96] *Lowenfield v. Phelps,* 817 F.2d 285, 292 (5th Cir.), *aff'd on other grounds,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).

guilty but mentally ill, and Cooke sat at the other side, arguing that he was factually innocent and not mentally ill. Cooke repeatedly stated that he was not guilty, and that he did not want his attorneys to present evidence to support a verdict of guilty but mentally ill. He was entitled to have his attorneys follow these directions.[97] Instead, the prosecutors and his own counsel simultaneously opposed him. The trial court was aware of these significant issues as early as the pre-trial conference. The conflict between Cooke and his attorneys manifested itself throughout the trial through Cooke's numerous outbursts, culminating in his testimony during the guilt/innocence phase, when he stated: "These counsel have misrepresented me so bad. They have railroad me through this whole thing. . . . I been got rid of these public defenders. I fired them a long time ago. The judge allowed me to keep them."

When defense counsel decides to concede not only guilt, but also eligibility for the death penalty over the defendant's express objection, the trial judge has an obligation to inquire into the propriety of counsel's representation. A strategy that Cooke was guilty but mentally ill is incompatible with factual innocence. In this instance, the trial judge's obligation to ensure that the defendant receives a fair trial required the trial judge to instruct counsel not to pursue a verdict

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[97] *See Red Dog*, 620 A.2d at 853-54; *Lowenfield*, 817 F.2d at 285.

of guilty but mentally ill against Cooke's wishes. The trial court's failure to provide this remedy denied Cooke his right to a fair trial.

Finally, we respectfully address our colleagues' dissent which concludes (1) that a *Strickland* analysis applies, and (2) that under that analysis, counsel satisfied Cooke's Sixth Amendment right to reasonably effective assistance of counsel. We agree with the Dissent that *Florida v. Nixon* does not reach the facts of this case.[98] We also recognize, as the Dissent does, the challenges defense counsel face in a capital case. Indeed, a capital case is the most challenging of criminal cases for everyone involved. But these challenges cannot justify infringement of a defendant's personal and fundamental right to plead not guilty, to testify in his own defense, and to have the issue of guilt determined by an impartial jury. Only the defendant may waive these rights, which are personal to him.

If we focus, as the Dissent has, upon the reality of a capital murder trial, that reality includes the likelihood that no jury will give fair consideration to a defendant's plea of not guilty, his sworn denial of guilt, or enforce the requirement of proof beyond a reasonable doubt, when a defendant's own counsel act

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[98] "In placing heavy emphasis on the client's refusal to make a choice, the *Nixon* Court arguably was reserving for another day the question of whether the counsel could have insisted upon the strategy if the client has opposed it." WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.6(b) (3d ed. 2007).

against his wishes and argue he is guilty, introduce evidence that incriminates him, and thereby prove his eligibility for a death sentence. The plain language of the Sixth Amendment confers the right to "the Assistance of Counsel for his defence." Cooke was effectively left without counsel during his testimony and throughout the proceedings on the critical issues of his guilt and his eligibility for the death penalty. In our view, the wide range of reasonable professional assistance allowed under *Strickland* does not contemplate such a structural defect so inherently prejudicial to the adversarial process and a fair trial. Instead, *Cronic* applies and the rationale of that case requires us to reverse.[99]

The Dissent's assertion that *Cronic* does not apply to the facts of this case is primarily based on its analysis of five factors that the Dissent contends are relevant to analyzing whether counsel failed to subject the State's case to meaningful adversarial testing: time afforded for investigation and preparation; experience of counsel; gravity of the charge; complexity of possible defenses; and accessibility of witnesses. The Dissent's reliance on these factors is misplaced. In *Cronic,* the United States Supreme Court criticized the Sixth Circuit's use of the factors (which were created by the Sixth Circuit), and later

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[99] *Cronic,* 466 U.S. at 658, 104 S.Ct. 2039 (Explaining that the three exceptions to the *Strickland* analysis represent "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.").

explained that, while "relevant to an evaluation of a lawyer's effectiveness in a particular case . . . neither separately nor in combination do they provide a basis for concluding that competent counsel was not able to provide this respondent with the guiding hand that the Constitution guarantees."[100] Moreover, to the extent *Cronic* could be read as endorsing these factors, the Court addressed them only in the context of whether "circumstances surrounding the [defendant's] representation" justified a "presumption that his conviction was insufficiently reliable to satisfy the Constitution."[101] They were expressly not applied to analyze whether the defendant "was denied the presence of counsel at a critical stage of the prosecution" or whether "based on the actual conduct of the trial, that there was a breakdown in the adversarial process."[102]

While we agree that "death is different," we do not agree with the Dissent's analysis that the wide discretion given defense counsel permitted the strategy in this case against Cooke's wishes. Cooke's ultimate authority to exercise his fundamental rights under *Jones* was personal to him. It is all the more important in a capital case for the court to protect these fundamental rights, otherwise, all defendants *but* capital defendants would have them. Cooke's

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[100] *Id.* at 652-53, 663, 104 S.Ct. 2039.

[101] *Id.* at 662, 104 S.Ct. 2039; *see also id.* at 663-66, 104 S.Ct. 2039 (addressing the inadequacy of the five factors).

[102] *Id.* at 662, 104 S.Ct. 2039

attorneys were constitutionally bound to respect the choices Cooke was entitled to make under *Jones*.

We also disagree with the Dissent's public policy argument. The short answer to the "detrimental public policy considerations" enumerated by the Dissent is that the fundamental rights we have explained are personal to the defendant and are not subject to these considerations. Every defendant, including Cooke, is entitled to a fair trial with the assistance of counsel necessary to justify reliance on the outcome. The Dissent describes the evidence as "overwhelming" but "[w]hether a man is innocent cannot be determined from a trial in which . . . denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented."[103] Given the failure of the adversarial process in this case, there is no other alternative except to grant a new trial.

IV. The Motion to Suppress Evidence.

Because a new trial is required, we will address Cooke's claim that the trial court erred in admitting evidence from the search of his residence at [Address Omitted]. Cooke moved to suppress this evidence, arguing that several items were seized that fell outside the scope of the warrant and that, to the extent the State relies on the consent of Campbell to

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[103] *Betts v. Brady*, 316 U.S. 455, 476, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942) (Black, J., dissenting)

the search, her consent was not voluntary. Cooke also claims that several items were seized that were outside the scope of Campbell's consent. The trial judge denied Cooke's motion to suppress evidence.

We review the grant or denial of a motion to suppress for an abuse of discretion.[104] "To the extent the trial judge's decision is based on factual findings, the Court reviews for whether the trial judge abused his or her discretion in determining whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous."[105] To the extent that this Court examines the trial judge's legal conclusions, we review *de novo* for errors in formulating or applying legal precepts.[106] Any claims Cooke raised in the Superior Court that are not raised on appeal are deemed abandoned.[107]

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[104] *See Lopez-Vazquez v. State,* 956 A.2d 1280, 1284 (Del.2008); *Culver v. State,* 956 A.2d 5, 10 (Del.2008); *Flonnory v. State,* 893 A.2d 507, 515 (Del.2006).

[105] *Lopez-Vazquez,* 956 A.2d at 1285; *Chavous v. State,* 953 A.2d 282, 286 n. 15 (Del.2008).

[106] *Lopez-Vazquez,* 956 A.2d at 1284-85; *Chavous,* 953 A.2d at 286 n. 15.

[107] *Somerville v. State,* 703 A.2d 629, 631 (Del.1997).

A. *Certain types of searches and seizures are excluded from the Fourth Amendment's probable cause and warrant requirements.*

In *Katz v. United States,*[108] the Supreme Court stated a basic constitutional rule that warrantless searches "are *per se* unreasonable under the Fourth Amendment – subject to a few specifically established and well-delineated exceptions." The Fourth Amendment requires that a warrant be supported by probable cause and describe with "particular[ity] . . . the place to be searched and the persons or things to be seized."[109] This limitation safeguards the individual's privacy interest against "the wide-ranging exploratory searches the Framers [of the Constitution] intended to prohibit."[110] As a general rule, police are precluded from seizing articles that are not specifically described in the search warrant.[111]

However, certain types of searches and seizures are valid exceptions to the probable cause and warrant requirements; these include seizures of items in plain

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[108] 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *see also Terry v. Ohio,* 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) ("[P]olice must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure.").

[109] U.S. CONST, amend. IV; *see also Marron v. United States,* 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed. 231 (1927).

[110] *Maryland v. Garrison,* 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987); *see also Marron,* 275 U.S. at 196, 48 S.Ct. 74.

[111] *Garrison,* 480 U.S. at 84, 107 S.Ct. 1013; *Marron,* 275 U.S. at 196, 48 S.Ct. 74.

view and consent searches. Police officers may seize evidence that is in plain view without a warrant, provided two criteria are satisfied.[112] First, the police must not "violate the Fourth Amendment in arriving at the [place] from which the evidence could be plainly viewed."[113] Thus, police may lawfully seize evidence in plain view when executing a search warrant[114] or when conducting a lawful warrantless search.[115] Second, the incriminating character of the evidence seized must be immediately apparent, and police may not disturb or further investigate an item to discern its evidentiary value without probable

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[112] *See Coolidge v. New Hampshire,* 403 U.S. 443, 467, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (plurality opinion); *see also Williamson v. State,* 707 A.2d 350, 358 (Del.1998).

[113] *Horton v. California,* 496 U.S. 128, 136, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).

[114] *See Coolidge v. New Hampshire,* 403 U.S. 443, 465, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (plurality opinion) (holding officers' presence for plain view seizure purposes justified by search warrant); *see also United States v. Menon,* 24 F.3d 550, 559 (3d Cir.1994) (holding officers' presence for plain view seizure of documents in desk justified by search warrant for documents).

[115] *Texas v. Brown,* 460 U.S. 730, 739, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) (holding plain view seizure of balloon filled with narcotics valid because officers were conducting investigatory detention of automobile at routine driver's license checkpoint); *Washington v. Chrisman,* 455 U.S. 1, 7, 102 S.Ct. 812, 70 L.Ed.2d 778 (1982) (holding plain view seizure of contraband valid because police officer was lawfully on premises incident to valid arrest); *Coolidge,* 403 U.S. at 465, 91 S.Ct. 2022 (holding plain view seizure valid because officers were on premises during hot pursuit).

cause.[116] These types of warrantless seizures are valid even if the officers fully expected to find the seized evidence.[117]

In addition to the plain view exception, police officers may also conduct a search and seizure without probable cause or a warrant based upon an individual's voluntary consent.[118] Consent may be express or implied, but this waiver of Fourth Amendment rights need not be knowing and intelligent.[119] To determine whether consent was given voluntarily, courts examine the totality of the circumstances surrounding the consent, including (1) knowledge of the constitutional right to refuse consent; (2) age, intelligence, education, and language ability; (3) the degree to which the individual cooperates with police; and (4) the length of detention and the nature of questioning, including the use of physical punishment or other coercive police behavior.[120] Generally, anyone having a reasonable

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[116] *Arizona v. Hicks*, 480 U.S. 321, 322, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987).

[117] *See Horton*, 496 U.S. at 137-41, 110 S.Ct. 2301; *see also Menon*, 24 F.3d at 560 (holding seizure of items in plain view valid though items not discovered inadvertently).

[118] *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *United States v. Givan*, 320 F.3d 452, 459 (3d Cir.2003) (holding motorist voluntarily consented to search of vehicle when officer told him he was free to go, search occurred in daylight, and motorist said he had nothing to hide).

[119] *See Schneckloth*, 412 U.S. at 241, 93 S.Ct. 2041.

[120] *See id.* at 226, 93 S.Ct. 2041; *see also United States v. Mendenhall*, 446 U.S. 544, 558, 100 S.Ct. 1870, 64 L.Ed.2d 497

(Continued on following page)

expectation of privacy in the place being searched may consent to a warrantless search, and any person with common authority over, or other sufficient relationship to, the place or effects being searched can give valid consent.[121]

B. *The search of Cooke's residence.*

In this case, while Cooke was being investigated as a suspect for the murder of Bonistall, the lead investigator, Detective Rubin, determined that Cooke was also wanted on an outstanding warrant for his arrest. After calling on Campbell – Cooke's girlfriend – several times at [Address Omitted], Cooke's last known address, Detective Rubin obtained a search warrant for that address for the purpose of determining Cooke's whereabouts.[122] The warrant authorized the police to search at that address for "any and all paperwork or information, electronic or otherwise that would indicate the whereabouts of James Cooke, including: Caller ID devices and cellular telephone address book contact information."[123]

(1980). *See generally Annual Review of Criminal Procedure,* 36 GEO. L.J. ANN. REV.CRIM. PROC. 83-89 (2007) (citing cases).

[121] *See Illinois v. Rodriguez,* 497 U.S. 177, 181-82, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990); *United States v. Matlock,* 415 U.S. 164, 171, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974)

[122] *See State v. Cooke,* 2006 WL 2620533, at *14-15 (Del.Super.Ct. Sept.8, 2006).

[123] *Id.* at *14, 19.

When police conducted the search, Campbell, who was nine months pregnant, was present with her three children. While some officers were searching the residence, Detective Rubin interviewed Campbell in her living/dining room. Because of the distractions at the house, Detective Rubin asked Campbell to accompany him to the police department to finish the interview. Upon returning to [Address Omitted] about midnight, Campbell gave the police her consent to take and seize items the police had located that had immediate evidentiary value, but that may not have squarely fallen within the scope of the search warrant.[124] The consent provided "I further authorize . . . the Newark Police Department to remove any letters, documents, papers, materials or other property which is considered pertinent to the investigation, provided that I am subsequently given a receipt for anything which is removed."[125]

Cooke challenges the following items taken, which the Superior Court found had been seized pursuant to Campbell's voluntary consent: (1) a pair of blue and white men's shoes; (2) a composition book; (3) a cassette tape; (4) three disposable cameras; (5) a Nokia cell phone; and (6) a bicycle, because they were outside the scope of the warrant and not listed on the consent form signed by Campbell.

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[124] *Id.* at *15-18.

[125] *Id.* at *18.

C. *The court did not err in concluding that the challenged items were within the scope of consent given by Campbell.*

Although the challenged items were not on the consent form, Campbell testified at the suppression hearing that she consented to the police taking those items as well.[126] Nevertheless, Cooke argues that the court erred in determining that the State satisfied its burden to prove by a preponderance of the evidence that Campbell's consent was voluntary. He asserts that before the search of her home, Campbell had exchanges with the Newark police which left her upset with how she was treated. He also notes that during the search, Campbell was interviewed by Detective Rubin in her dining room and, at some point, Campbell testified that an FBI agent told her "she could do it the easy way or the hard way" and threatened that if she did not go willingly back to the police station for further questioning, she could be arrested and that her children could be taken from her. Detective Rubin gave a slightly different version, stating that the FBI agent did not say anything to Campbell until they were at the police station.[127]

In fact, Campbell was not arrested, and she went willingly to the police station. She sat in the front seat of the police car and was not handcuffed. While at the police station, she was told that she would be

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[126] *Id.* at *18.

[127] *Id.* at *16, 17.

videotaped. Campbell was provided water and testified that she was comfortable throughout the interview. She further testified that she felt comfortable leaving her children at home with the other police detectives, that she never felt threatened by Detective Rubin, and that she made all of her statements voluntarily.

Given the totality of the circumstances, we conclude that the record supports the trial court's determination that Campbell voluntarily consented to the search and seizure of the challenged items. She was informed of her right to refuse to consent. Campbell was over eighteen and there was no evidence that she lacked the intelligence, education, or language ability to validly give consent. In addition, Campbell at all times cooperated with the police officers, willingly answering questions at her home and then willingly accompanying the officers to the police station. The evidence indicates that while detained and questioned by police, Campbell was not physically abused or subjected to coercive police behavior. Although there was testimony from Campbell that she was told she could get in trouble if she was covering up for Cooke, Campbell also testified that she went willingly to the police station and was not pressured to cooperate. The trial court found her consent to be voluntary,[128] and that finding is supported by the evidence.

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[128] *Id.* at *27.

The cases relied upon by Cooke are distinguishable. In *Bumper v. North Carolina,*[129] a consent search was invalidated due to the fact that the searching officers represented they had a warrant, when in fact, none existed. In *United States v. Johnson,*[130] the Ninth Circuit invalidated a consent search where the officers concealed their true identity as a way to gain entry into the residence. These cases are inapposite to the facts of this case. Because the Superior Court's factual findings are supported by sufficient evidence and the court did not err in applying legal precepts, Cooke's motion to suppress was properly denied.[131]

V. Conclusion

The judgment of the Superior Court is **REVERSED** and this matter is **REMANDED** for a new trial.

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[129] 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

[130] 626 F.2d 753 (9th Cir.1980).

[131] The State also argues that the plain view exception should apply to these items because they were seized by officers who were lawfully in the place from which the evidence was in plain view, and each item had immediate evidentiary value. However, the Superior Court found that it had no evidentiary basis on which to rule on the plain view issue because the officer who seized most of the items at issue did not testify at the suppression hearing. *Cooke,* 2006 WL 2620533, at *27. The court did not abuse its discretion in refusing to rule on whether the seizures comported with the plain view exception.

STEELE, Chief Justice and JACOBS, Justice dissenting:

While we commend our colleagues for their exhaustive effort in scrutinizing the record in this case, we fundamentally disagree with their core analysis – a holding that *U.S. v. Cronic,*[132] not *Strickland v. Washington,*[133] is the template for resolving the knotty problem of determining whether counsel's defensive strategy so sharply contrasted with Cooke's expressed objective that the strategy deprived Cooke of his right to reasonably effective assistance of counsel. In our view, the Majority fails to come to grips with the reality that "death is different" and that the guilt and penalty phases are so inextricably intertwined, that counsel's effectiveness must be scrutinized with the specter of death as the omnipresent backdrop. While the Majority believes that defense counsel's strategy undermined Cooke's objective and deprived Cooke of the right to make fundamental decisions, we believe defense counsel pursued an appropriate strategy while upholding all of Cooke's fundamental rights.

We dissent because: (1) we conclude that a *Strickland* analysis applies; and (2) under a *Strickland* analysis, counsel satisfied Cooke's Sixth Amendment right to reasonably effective assistance of counsel. We also conclude that the issue of effective

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[132] 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

[133] 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

assistance of counsel, albeit inconsistent with our usual practice, can be resolved in this appeal based on the established record.[134] We, therefore, would affirm Cooke's convictions.

Strickland Controls When Counsel Chooses a Legal Strategy

In *Strickland v. Washington,* the United States Supreme Court held that under the Sixth Amendment, the defendant has a right to reasonably *effective* assistance of counsel.[135] The Court there emphasized that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[136] To establish that counsel violated his Sixth Amendment right, a defendant must demonstrate not only that counsel's performance was deficient but also that the deficiency was "so

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[134] We do agree with the Majority's holding on the trial judge's ruling on the Motion to Suppress.

[135] *See Strickland,* 466 U.S. at 686, 104 S.Ct. 2052 (1984) (citing *McMann v. Richardson,* 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)) (emphasis added); *see also, e.g., Roe v. Flores-Ortega,* 528 U.S. 470, 476, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *Trapnell v. U.S.,* 725 F.2d 149, 151-52 (2d Cir.1983).

[136] *Strickland,* 466 U.S. at 686, 104 S.Ct. 2052. The Majority also cites *Strickland* for this proposition and appears, at least initially, to believe a "just result" to be the ultimate test for counsel's effectiveness.

serious as to deprive [him] of a fair trial."[137] Judicial scrutiny of counsel's performance is highly deferential, and any "ineffectiveness claim must consider the totality of the evidence before the judge or jury."[138]

Generally, there is a presumption of defense counsel's competence, with the burden to establish a Sixth Amendment violation resting on the defendant.[139] In *U.S. v. Cronic,* however, the U.S. Supreme Court held that a Sixth Amendment violation is presumed where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing" or where there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[140] The

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[137] *Id.* at 687, 104 S.Ct. 2052; *see also Cronic,* 466 U.S. at 656, 104 S.Ct. 2039 ("[I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.").

[138] *Strickland,* 466 U.S. at 695, 104 S.Ct. 2052. Courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. 2052.

[139] *Staats v. State,* 961 A.2d 514, 518 (Del.2008) (citing *Flamer v. State,* 585 A.2d 736, 753-54 (Del.1990)); *see also Michel v. Louisiana,* 350 U.S. 91, 100-01, 76 S.Ct. 158, 100 L.Ed. 83 (1955).

[140] *Cronic,* 466 U.S. at 659, 104 S.Ct. 2039. "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.*; *see also Bell v. Cone,* 535 U.S. 685, 696-97, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (holding that "the attorney's failure must be complete").

Nixon Court specifically recognized the presumption of a violation only where there is a "complete denial of counsel"[141] to the defendant or where counsel is "either totally absent, or prevented from assisting the accused during a critical stage of the proceeding."[142]

In *Florida v. Nixon*, the U.S. Supreme Court held that *Strickland,* rather than *Cronic,* was the appropriate standard for reviewing defense counsel's failure "to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial."[143] The Court began its analysis by noting that, although counsel "has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy [,]"[144] counsel need not "obtain the defendant's consent to 'every tactical decision.'"[145] The Court distinguished the strategic choice of *conceding guilt in the guilt phase,* which may be "tactically advantageous for the defendant,"

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[141] *Cronic,* 466 U.S. at 659, 104 S.Ct. 2039.

[142] *Id.* at 659 n. 25, 104 S.Ct. 2039 (citations omitted).

[143] *Florida v. Nixon,* 543 U.S. 175, 186-87, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004).

[144] *Id.* at 187, 125 S.Ct. 551 (quoting *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052). "A defendant . . . has 'the ultimate authority' to determine 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.'" *Id.* (quoting *Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); *Wainwright v. Sykes,* 433 U.S. 72, 93 n. 1, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)).

[145] *Id.* (quoting *Taylor v. Illinois,* 484 U.S. 400, 417-18, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988)).

from *actually pleading guilty.* The latter choice, unlike the former, waives the defendant's constitutional rights to "trial by jury, the protection against self-incrimination, and the right to confront one's accusers."[146] The Court concluded that "counsel lacks authority to consent to a guilty plea on a client's behalf"[147] and that "a defendant's tacit acquiescence in the decision to plead is insufficient to render the [guilty] plea valid."[148]

The *Nixon* Court distinguished a concession of guilt – where the defendant "retain[s] the rights accorded a defendant in a criminal trial" including the rights to "cross-examine witnesses for the prosecution . . . [to] endeavor . . . to exclude prejudicial evidence" and the right to appeal "in the event of errors in the trial or jury instructions" – from a guilty plea, where the prosecution need not present evidence "establishing the essential elements of the crimes with which [the defendant] was charged."[149] The Court pointedly refused, however, to require a defendant's "affirmative, explicit acceptance" of counsel's tactical decision

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[146] *Id.* (citing *Boykin v. Alabama,* 395 U.S. 238, 240, 242-43, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)).

[147] *Id.* (citing *Brookhart v. Janis,* 384 U.S. 1, 6-7, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966)).

[148] *Id.* at 188, 125 S.Ct. 551 (citing *Boykin,* 395 U.S. at 242, 89 S.Ct. 1709).

[149] *Id.*

to concede guilt, because conceding guilt is not "the equivalent of a guilty plea."[150]

Although in *Nixon,* the U.S. Supreme Court concluded that *Strickland* applies where a defendant neither expressly consents nor expressly objects to his counsel's tactical decision to concede guilt,[151] the Court did not address whether the *Strickland* standard applies where – as here – the defendant clearly and consistently objects to counsel's defense strategy. Unlike the defendant in *Nixon,* Cooke consistently and expressly objected to his counsel's presenting a Guilty But Mentally Ill (GBMI) defense. Thus, *Nixon,* does not reach the facts of this case.

It is at this juncture that we and the Majority part company. *Nixon* holds that " . . . a lawyer must both consult with the defendant and obtain consent to the recommended course of action" concerning "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."[152] That is all that *Nixon* holds. The Majority, however, extends *Nixon* to support their claim that, even though Cooke's counsel consulted and obtained Cooke's consent concerning his fundamental rights, counsel "undermine[d]" and

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[150] *Id.* at 188-89, 125 S.Ct. 551 (citing *Brookhart,* 384 U.S. at 7, 86 S.Ct. 1245 (holding that a "prima facie" bench trial, relieving the prosecution of its burden of proof beyond a reasonable doubt, is the equivalent of a guilty plea)).

[151] *See id.* at 189, 191, 125 S.Ct. 551.

[152] *Id.* at 187, 125 S.Ct. 551.

"deprived Cooke of his constitutional right to make fundamental decisions regarding his case." The Majority must rely on their expanded *Nixon* holding to construct support for their foundational proposition – counsel is *per se* ineffective if counsel fails to pursue the innocence "objective" that they believe follows from pleading not guilty – even where asserting innocence at trial despite overwhelming evidence to the contrary would enhance the risk of receiving the death penalty. The Majority's proposition (and expansive interpretation of *Nixon*) is flawed because a defendant's choice to plead not guilty may result in either asserting innocence or challenging the State to prove guilt beyond a reasonable doubt. In this case, Cooke's counsel pursued this latter corollary objective of pleading not guilty, while at the same time they presented a strategy of using GBMI in order to save their client's life. We must decide, therefore, with little guidance from federal case law, whether *Strickland* or *Cronic* applies where the defendant explicitly disagrees with counsel over defensive strategy.

In our view, *Strickland,* not *Cronic,* should apply to this situation, because *Cronic* applies only where counsel does *nothing* or *next to nothing* to discharge his duty to present a vigorous defense.[153] *Cronic* is an exception to *Strickland,* and permits a presumption of

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[153] *Id.* at 189, 125 S.Ct. 551 (holding that *Cronic* is "reserved for situations in which counsel has entirely failed to function as the client's advocate."); *see also Bell v. Cone,* 535 U.S. 685, 696-97, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

a Sixth Amendment violation only where there is a "complete denial of counsel," where counsel is absent or is prevented from assisting the defendant during a critical stage of the proceeding, or where counsel fails to subject the prosecution's case to "meaningful adversarial testing."[154] None of these circumstances is presented here.

In Capital Cases Involving Overwhelming Evidence of Guilt, Counsel Satisfies the Sixth Amendment by Subjecting the State's Case to an Adversarial Process

To establish a Sixth Amendment violation under *Cronic's* standard, the accused bears the burden of proving that counsel entirely failed to subject the State's case to a meaningful adversarial process.[155] In *Cronic,* the U.S. Supreme Court held that the following factors are relevant to analyzing counsel's effectiveness: the time afforded for investigation and preparation; experience of counsel; the gravity of the charge; the complexity of possible defenses; and the accessibility of witnesses.[156] "The five factors . . . are relevant to an evaluation of a lawyer's effectiveness in a particular case, but neither separately nor in combination do they provide a basis for concluding

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[154] *See U.S. v. Cronic,* 466 U.S. 648, 659-62, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

[155] *Id.* at 659, 104 S.Ct. 2039.

[156] *Id.* at 663-66, 104 S.Ct. 2039.

that competent counsel was not able to provide [the defendant] with the guiding hand that the Constitution guarantees."[157]

To satisfy the Sixth Amendment requirement of effective assistance, "counsel must function as an advocate for the defendant, as opposed to a friend of the court."[158] *Cronic,* however, limited counsel's duty as an advocate in cases where there is "no bona fide defense to the charge."[159] The Court specifically recognized that "counsel cannot create [a defense] and may disserve the interest of his client by attempting a useless charade."[160]

In *Nixon,* a heinous capital murder case involving overwhelming evidence against the defendant, the U.S. Supreme Court recognized that defense counsel must consider both the guilt and penalty phases in determining how best to proceed.[161] The Court reasoned that, where the evidence is overwhelming and the crime atrocious, "avoiding execution may be the best and only realistic result possible."[162] Given

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[157] *Id.* at 663, 104 S.Ct. 2039.

[158] *Id.* at 656 n. 17, 104 S.Ct. 2039 (quoting *Jones v. Barnes,* 463 U.S. 745, 758, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (Brennan, J., dissenting)).

[159] *Id.* at 656 n. 19, 104 S.Ct. 2039 (citations omitted).

[160] *Id.*

[161] *See Florida v. Nixon,* 543 U.S. 175, 192, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004).

[162] *Id.* at 191, 125 S.Ct. 551 (citations and internal brackets omitted).

overwhelming evidence of guilt, the best *defense* may be to present a case that is the functional equivalent of a plea for a life sentence, while at the same time testing the prosecution's case yet not running the risk by professing innocence of increasing the chances of the death penalty.[163] Supportive of that reality are the ABA's *Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases,* which suggest that "[i]deally, the theory of the trial must complement, support, and lay a groundwork for the theory of mitigation."[164] In certain cases, to preserve credibility in the penalty phase, defense counsel must avoid making fruitless and potentially harmful arguments during the guilt phase.[165]

It is well settled that in capital cases defense counsel can concede guilt as a trial tactic in the guilt phase, to preserve credibility in the penalty phase, where the defendant knows of the tactic and does not expressly object to it.[166] Counsel, however, must consult with the defendant concerning the overall defense strategy.[167] That said, the defendant's consent to every tactical decision is not required.[168] Conceding guilt

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[163] *See id.*

[164] 31 Hofstra L.Rev. 913, 1059 (2003) (internal quotations omitted).

[165] *See id.*

[166] *See, e.g., Nixon,* 543 U.S. at 192, 125 S.Ct. 551; *Dillbeck v. State,* 882 So.2d 969, 975 (Fla.2004).

[167] *See Nixon,* 543 U.S. at 187, 125 S.Ct. 551.

[168] *Id.*

alone does not violate a fundamental right. Indeed, as the U.S. Supreme Court has recognized, defendants' only fundamental rights are the right to plead guilty, waive a jury, testify or not, or to take an appeal.[169]

Red Dog v. State,[170] for instance, focused on a defendant's fundamental right to appeal. In *Red Dog,* counsel attempted to act in the best interest of the defendant by filing an appeal on his behalf – contrary to the defendant's objective.[171] In Red Dog's Motion for Stay of Execution, we held that his counsel acted "in derogation of [the defendant's] express directions to the contrary"[172] because "the decision to pursue or dismiss any application for post-conviction relief . . . is [the defendant's] to make."[173] *Red Dog* differs from this case even though in both cases defense counsel diverged from the defendant's "objective." *Red Dog's* defense counsel, however, violated Red Dog's fundamental right to take or refuse to take an appeal. Not so with Cooke, who asserted all of his fundamental rights: he pleaded not guilty, had a trial by jury, testified, and took a direct appeal.[174] Nothing in *Red Dog* supports the Majority's citation to that case for the proposition that beyond entering a not guilty

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[169] *Id.*

[170] *Red Dog v. State,* 620 A.2d 848 (Del.1993).

[171] *Id.* at 848.

[172] *Id.* at 852-53.

[173] *Id.* at 854 (citing *Smith v. Armontrout,* 857 F.2d 1228, 1229 (8th Cir.1988)).

[174] *See Nixon,* 543 U.S. at 187, 125 S.Ct. 551.

plea, "[t]he decision to pursue a verdict of not guilty and assert his factual innocence belongs to the defendant."

There is at least one capital case where the defendant openly objected to defense counsel conceding his guilt. In *Haynes v. Cain,* Louisiana indicted a defendant for first degree murder and sought the death penalty.[175] Defense counsel concluded that the best trial strategy would be to concede the allegations except for the element of intent to cause death, in order to preserve the defendant's life.[176] That strategy was intended to result in a conviction of second degree murder, thereby avoiding the death penalty.[177] Following the opening statement, the defendant informed the trial judge that he did not agree with defense counsel's strategy.[178] Concluding that excellent attorneys represented the defendant, the judge denied his request for a change of counsel.[179]

Cooke and his counsel's differing views on strategy cannot and do not lead inexorably to the conclusion that he received a "complete denial of counsel," as the majority suggests. Cooke's counsel actively engaged in the pretrial and trial proceedings.

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[175] *See generally Haynes v. Cain,* 149 F.3d 1174 (5th Cir.1998).

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

They were never absent at any stage of the trial. Cooke not only had access to counsel but also had the discretion to make key decisions at critical stages of the trial. To reiterate: Cooke pleaded not guilty, testified, his counsel cross examined witnesses against him where advantageous, and Cooke filed an appeal.[180] Given what any reasonable person would conclude to be "overwhelming evidence of guilt," Cooke's defense counsel recognized that, "given the strength of the evidence, that . . . [Cooke's] guilt was not subject to any reasonable dispute."[181] Given the overwhelming evidence against their client, Cooke's counsel similarly concluded that "the only way to save [Cooke's] life would be to present extensive mitigation evidence centering on . . . mental instability."[182] Although their strategy entailed implicitly conceding guilt, counsel did not prevent Cooke from pleading not guilty, did not waive Cooke's trial rights and did not hinder his right to appeal. Counsel's strategy focused on preserving Cooke's life – the best and only realistic

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[180] These are the fundamental rights recognized by *Florida v. Nixon*, 543 U.S. 175, 188-89, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004); *see also Brookhart v. Janis*, 384 U.S. 1, 6-7, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966) (Counsel must have the "constitutional right to plead not guilty and have a trial in which he can confront and cross examine witnesses against him").

[181] *See Nixon*, 543 U.S. at 180-81, 125 S.Ct. 551.

[182] *See id.* ("[Nixon's counsel] concluded that the *best* strategy would be to concede guilt, thereby preserving his credibility in urging leniency during the penalty phase") (emphasis added).

possible result – similar to the strategy counsel employed in *Nixon*.

Although defense counsel's decision to present a GBMI defense constrained them from arguing his innocence, counsel still zealously advocated for Cooke and contested the State's case. Defense counsel filed several pretrial motions to suppress evidence and motions to exclude certain unfairly prejudicial evidence. Defense counsel also filed motions to change venue and to declare the Delaware death penalty statute unconstitutional. During trial, counsel also cross examined witnesses where there may have been merit in doing so, and moved to suppress evidence of an alleged crime that occurred after the murder.

The only instance where defense counsel arguably affirmatively conceded guilt beyond asserting GBMI was through the testimony of Dr. Turner, a psychologist who had evaluated Cooke before trial. Dr. Turner testified that during an interview Cooke had admitted culpability, at least in part. Despite that equivocal testimony, the Majority writes as if the "confession" stood uncontradicted even by Cooke himself during sessions with Dr. Turner. That portrayal is incomplete. Dr. Turner also testified that Cooke told him (Turner) that: he could not believe what he was doing, that he did not remember anything, that he could not believe the victim was dead, and on occasion, Cooke even denied having committed the crimes. Dr. Turner's testimony supported a finding

that Cooke was mentally ill, consistent with counsel's GBMI mitigation defense.[183]

We cannot conclude that defense counsel "entirely failed" under any of the factors suggested in *Cronic's* five prongs, because counsel: (1) investigated and prepared the case; (2) were highly experienced capital defense lawyers; (3) lacked any other plausible defenses; (4) and were accessible to Cooke.[184] We, therefore, believe that *Strickland,* not *Cronic,* provides the template for evaluating counsel's performance in order to determine whether Cooke received a fair trial. For those reasons, we cannot agree that defense counsel's strategic actions violated Cooke's Sixth

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[183] The Majority suggests that defense counsel introduced this allegedly damning evidence, "unreachable" by the prosecution without Cooke's waiver of psychoanalyst privilege. We cannot find record support for that conclusion but suggest it is of little consequence because Dr. Turner's testimony about Cooke's "admission" was highly equivocal at best and of no moment given the overwhelming evidence (including Cooke's own testimony), placing him at the scene of the rape and murder.

[184] *See U.S. v. Cronic,* 466 U.S. 648, 663-66, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Even with clear record support for counsel's effort, the Majority cites *Bell v. Cone,* 535 U.S. 685, 696-97, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (holding that "the attorney's failure must be complete") and *State v. Carter,* 270 Kan. 426, 14 P.3d 1138, 1146 (2000) (quoting *U.S. v. Swanson,* 943 F.2d 1070, 1071 (9th Cir.1991)) (claiming that "counsel's abandonment of his client's defense [by conceding the only disputed facts in closing argument] caused a breakdown in [the] adversarial system of justice"). Here, counsel did not abandon Cooke's defense; they simply did not pursue Cooke's irrational and unreasonable strategy to pursue innocence.

Amendment rights. In capital cases that involve overwhelming evidence of guilt and where defense counsel utilizes a strategy that may not frontally support the original not guilty plea, counsel's most effective course might be to force the State to prove guilt beyond a reasonable doubt while at the same time tactically striving to avoid the death penalty.[185] No U.S. Supreme Court opinion holds that that strategy is constitutionally pr[o]escribed.

Death is Different

Capital cases are inherently different from ordinary criminal cases for the obvious reason that death may be the penalty after conviction in the guilt phrase. Death differs from incarceration in two important ways. First, taking the defendant's life is the severest form of punishment. Second, death is irrevocable. These patently clear differences make it essential that the criminal justice system contain adequate safeguards to make certain that the death penalty is carried out only where it is the only appropriate punishment.

One important safeguard is that, unlike ordinary criminal trials, capital cases are tried in two separate

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[185] *See, e.g., id.* at 659, 104 S.Ct. 2039; *Nixon,* 543 U.S. at 191, 125 S.Ct. 551.

proceedings – a guilt phase and a penalty phase.[186] During the guilt phase a jury decides whether the defendant is guilty of the crimes he is charged with having committed.[187] If the jury finds the defendant guilty of a capital crime, the case proceeds to the penalty phase, during which the defendant is on trial for his life.[188] In this phase of the trial, the central issue is "the meaning and value of the defendant's life."[189] That is why the defendant's lawyers are permitted to provide the jury with mitigating evidence of why the jury should spare the defendant's life.[190]

The unique nature of capital cases requires that defense attorneys be given wide discretion to defend their clients in both the inextricably linked guilt and penalty phases as the individual case demands. First, the dual nature of a capital trial forces defense counsel to make strategic choices that are not required in a noncapital criminal case. Second, in a capital case it is far more difficult to discern the client's sincere objectives than in an "ordinary" criminal trial.

The severity and irrevocability of death hangs like a pall over the dual phased capital case proceedings.

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[186] *See* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L Rev. 299, 303 (1983).

[187] *Id.*

[188] *Id.* at 305.

[189] *Id.* at 303.

[190] *Id.*

"The penalty phase of a capital trial differs so greatly from an ordinary criminal trial that the usual standards for assessing competency of counsel in criminal cases are inadequate in death penalty cases."[191] In general, attorneys are ethically bound to try to secure the most favorable possible outcome for their client.[192] In many situations, the guilt of the defendant is so clear beyond a reasonable doubt that an attorney's only option for his client to escape the death penalty is to fix in the jury's minds during the penalty phase a compelling basis for a sentence of life in prison.[193]

In capital cases with overwhelming factual evidence of guilt, attorneys should not be second-guessed for focusing on preserving the defendant's life rather than proving his innocence – irrespective of the defendant's inconsistent demands. Several studies have shown that jurors approach the sentencing phase cynically where counsel's sentencing-phase presentation is logically inconsistent with their earlier

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[191] *Id.* at 304.

[192] *Id.* at 319-20; *see also* Russell Stetler, *Commentary on Counsels Duty to Seek and Negotiate a Disposition in Capital Cases*, 31 Hofstra L.Rev. 1157, 1165 (2003) ("The revised ABA Guidelines place proper emphasis on the need to take every possible step towards resolving capital cases for a sentence less than death. . . .").

[193] *See* Scott Sunby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L.Rev. 1557, 1589-91 (1998).

guilt-phase defense.[194] Courts that make it extremely difficult for defense counsel to obtain the best realistic outcome for their client, and that bar defense counsel from focusing on sparing a defendant's life, increase the likelihood that the defendant will be sentenced to death.

Courts should also give wide discretion to defense counsel because it is much harder for counsel to discern the true wishes of a client in a death penalty case than in an ordinary criminal case. Given the severity and irrevocability of the death penalty, coupled with the protracted nature of a two phase trial, death penalty cases exact a severe emotional and psychological toll on defendants.[195] This stress, in many cases, "distorts reactions and effects decisions."[196] Capital defense attorneys thus face both the practical and moral difficulty of trying to discern what their clients' actual objectives may be and whether those objectives are rational. Given that difficulty, defense counsel should be accorded wide latitude in determining the best approach to save their clients' lives.

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[194] *See, e.g., id.* at 1589-91; Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L.Rev. 299, 329 (1983).

[195] *See* Goodpaster, 58 N.Y.U. L.Rev. at 323.

[196] *Id.*

Applying Cronic's Presumption Would Be Bad Public Policy

If the *Cronic* standard were to be applied to *Cooke,* as the majority has declared, then a defendant's death penalty conviction could be overturned on Sixth Amendment grounds without any inquiry being made into counsel's actual performance at trial or into whether counsel's strategic decisions had any effect on the trial's outcome.[197] That result would have several detrimental public policy implications.

First, the *Cronic* standard's economic costs are higher. Where a conviction is overturned, the State must decide whether to drop charges, negotiate a plea, or retry the case. In most death penalty cases where the evidence against the defendant is overwhelming and the nature of the crime is heinous, prosecutors are likely to seek a retrial.[198] Because under *Cronic* no analysis is undertaken to determine if any alleged error on the part of counsel could have or actually did play a substantial role in the defendant's conviction, the State would be forced to retry the cases. Thus, tax payers would effectively pay twice for retrial of cases where the evidence of guilt is so overwhelming that the second trial will almost unquestionably result in the same outcome as the first.

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[197] *See Bell v. Cone,* 535 U.S. 685, 696-97, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

[198] *See* Sunby, 83 Cornell L.Rev. at 1589-91.

Second, using *Cronic* as a metric for counsel's performance in a case such as this would negatively affect a defendant's ability to obtain the very counsel the Sixth Amendment requires. Not only is the right to counsel constitutionally protected, but also there are important practical reasons why it is required. Our judicial system is designed to "promote the ultimate objective that the guilty be convicted and the innocent go free."[199] The right to counsel is important because it helps ensure that innocent individuals are not found guilty simply because they are ignorant of their constitutional rights.[200] The right to counsel mitigates that concern, because "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled."[201]

The majority's restriction of counsel's strategic options in capital cases would undermine defendants' right to counsel in two important ways. First, attorneys may be unwilling to serve in capital cases because of the intense scrutiny to which they would be subjected. "Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense

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[199] *See Herring v. New York*, 422 U.S. 853, 863, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975).

[200] *See Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

[201] *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client."[202] Finding counsel who are, both willing and able to take on capital cases constitutes a more severe problem than in ordinary criminal cases, because death penalty cases are so fundamentally different. "Capital cases require perceptions, attitudes, preparation, training, and skills that ordinary criminal defense attorneys may lack."[203] Because most attorneys are neither capable of nor willing to handle a capital case, it is essential that the small percentage of attorneys trained in capital cases be willing to accept assignment. If attorneys with the skills to try capital cases are unwilling to do so, it will be difficult for Delaware to ensure that defendants receive adequate counsel.

Even where attorneys are willing to defend capital defendants, there is a danger that the quality of their work could suffer. Defending capital defendants is a difficult job involving long hours, little pay, and extremely difficult decisions. There is a strong possibility that second guessing and criticizing every move that defense attorneys make could lead to systemic demoralization that would adversely effect the effort counsel invest in defending their clients.

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[202] *Id.* at 690, 104 S.Ct. 2052.

[203] Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L.Rev. 299, 303-04 (1983).

We conclude that the Majority applies the wrong standard for scrutinizing counsel's efforts, even though the Majority concedes that the litmus test is: "[w]hether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a **just result.**" The majority errs by focusing on counsel's obligation to acquiesce in Cooke's objective, rather than on whether Cooke received a fair trial with reasonably effective assistance of counsel that produced a "just result." Nowhere does the Majority even suggest that a new trial where counsel blindly follows Cooke's irrational position would produce a more "just" outcome. Therefore, we respectfully dissent.

2007 WL 2129018 (Del. Super.)

Superior Court of Delaware,
New Castle County.
STATE of Delaware
v.
James E. COOKE, Defendant.
Criminal Action Numbers IN-05-06-1529,
IN-05-06-1533, IN-05-06-2390, IN-05-06-2394.
ID No. 0506005981.

June 6, 2007.

Steve P. Wood, Esquire, Deputy Attorney General, Diane C. Walsh, Deputy Attorney General, and Danielle J. Brennan, Esquire, Department of Justice, attorneys for State of Delaware.

J. Brendan O'Neill, Esquire, and Kevin J. O'Connell, Esquire, of Wilmington, Delaware, attorneys for the defendant.

SENTENCING DECISION

HERLIHY, Judge.

On March 8, 2007, the jury found defendant James Cooke guilty of intentional murder, felony rape/murder and rape in the first degree. Because of these verdicts, a penalty hearing was conducted. The same jury on March 21, 2007 unanimously voted to recommend that the death penalty be imposed.

Jury selection for this case began on January 23, 2007 and concluded on January 30th. The evidence presentation started on February 2 and concluded on February 28th. The jury was given its guilt phase instructions on March 5th. It returned with its verdict on March 8th. The penalty hearing evidence began on March 13th and finished on March 16th. The jury was given penalty hearing instructions on March 19th. On March 21st it came back with its sentencing recommendation.

Charges

Cooke was indicted for the following offenses:

Count I – the charge of intentional murder of Lindsey Bonistall;

Count II – the charge of felony murder (rape/murder) of Lindsey Bonistall;

Count III – the charge of rape first degree involving Lindsey Bonistall;

Count IV – the charge of burglary first degree involving Lindsey Bonistall's apartment and the rape charge;

Count V – the charge of arson first degree involving the apartment building in which Bonistall's apartment was located;

Count VI – the charge of reckless endangering first degree relating to that apartment building;

Count VII – the charge of burglary second degree involving the residence of Amalia Cuadra;

Count VIII – the charge of robbery second degree and the alleged victim is Amalia Cuadra;

Count IX – the charge of theft (misdemeanor) involving the property of Amalia Cuadra;

Count X – the charge of burglary second degree relating to the residence of Cheryl Harmon; and

Count XI – the charge of theft (misdemeanor) involving the property of Cheryl Harmon.

Prior to trial, Cooke had moved to sever Counts VII through XI from the first six Counts. The basis for seeking severance was that he intended to plead not guilty to Counts VII-XI while pleading guilty, but mentally ill to the charges in Counts I-VI involving Lindsey Bonistall. The Court denied that motion.[1] At trial, he changed his plea to guilty, but mentally ill as to all eleven Counts. The jury's verdicts were guilty as to all charges.

The Charges

The focus of this decision, of course, is a determination of the appropriate sentence for the two murder first degree convictions. But the evidence on

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[1] *State v. Cooke,* 909 A.2d 596 (Del.Super.2006).

those charges is intertwined with the evidence relating to the remaining charges. The more understandable approach to all of the charges and to the evidence is to proceed chronologically.

Cheryl Harmon lived in building 11 of the Towne Court Apartments, Newark, Delaware, in April 2005. She left her apartment around 7 a.m. on April 26th and returned around 11:30 p.m.[2] When she opened her apartment door, she saw bright red writing on her front living room wall. She backed out of her apartment noting a strong odor of fingernail polish. The writing she saw and more which was discovered elsewhere in her apartment had, most likely, been written with red fingernail polish. A living room window, previously locked, had been pried to gain entry. Various items were taken. But of special interest of the stolen objects were two things: a class ring with "Cheryl R. Harmon" engraved in cursive in it and a ring with "Cheryl" engraved in it.

The red nail polish writings were in large print. They were on two walls and on a door:

"I WHAT (sic) My Drug Money"

"We'll Be Back"

"DON'T Mess With My Men"

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[2] That's the time she gave at trial. At the time she reported the incident she told the police it was just after one a.m.

There were no immediate suspects. On April 29, 2005, Amelia [sic] Cuadra was living at [Address Omitted] in Newark, which is not too far from Harmon's residence. She is a graduate student in chemical engineering at the University of Delaware. She was asleep in the early morning when she sensed a flashlight shining in her face. At first, she thought it was her house-mate, Carolina Bianco, who was home at that time. She called quietly "Carolina" (pronounced Caroleena) two times.

But then a male voice said, "Shut the (deleted) up or I'll kill you." "I know you have money. Give me you (deleted) money." Cuadra got out of bed. She had a T-shirt and underwear on; she wrapped a blanket around her. The male was still shining the flashlight in her face and standing closer.

Cuadra walked over to her desk where her wallet was. When picking it up, she also apparently (inadvertently) picked up her cell phone. The man was now about two feet or less from her. She gave him some cash, maybe $45.00. He then said, "Give me your (deleted) credit cards or I'll kill you." She did. They were an American Express card and a University of Florida VISA card (Cuadra had attended University of Florida as an undergraduate).

Somehow Cuadra had managed to press 911 on her cell phone. Around this time, the male intruder said, "Take off your (deleted) clothes or I'll kill you." He told her he had a weapon. At this point, Cuadra screamed out "Carolina" several times. Even though

she had pressed 911, which appeared on the cell phone's screen, she had not also pressed "send." The intruder tried to get the phone from Cuadra. He probably saw the 911, and with her screaming for Carolina, he fled.

Cuadra described the male intruder as a light skin, African-American, in his late 20's or early 30's, around 5'6" or 5'7" (being 3-4" taller than she at 5' 3½"), chubby or puffy cheeks, and wearing a gray hoodie and light blue pants. The hood was pulled over his head and down to near his eyebrows. He was wearing gray gloves, which had lighter and darker shades. After the man left, Cuadra called 911. Carolina Bianco's cell phone was taken. Cuadra's light blue/grayish Jansport backpack was also taken, but the intruder had gone through it first and removed some of her research papers. The backpack had been in a chair next to the dining room table. The remaining, but now stolen, contents were an "iPod" and a metallic "tin looking" container which had diet pills in it. The backpack had her name tag on it, "Amalia Cuadra."

Entry to the apartment had been gained through a door to the laundry room.

When she called VISA a little while later, she was informed that someone had attempted to use her card at 4:19 that same morning. She passed that along to the Newark Police who determined that Cuadra's VISA card had been used – unsuccessfully – at a Wilmington Trust ATM on Elkton Road. This location was not far

from her townhouse and the use was only a few hours after the incident at her residence. It also is not far from Cooke's then residence. The police were able to quickly retrieve a surveillance videotape from the ATM vestibule. They promptly developed some still photos from the video.

Cuadra came to the Newark Police station within a day or two to help develop a composite drawing of the intruder. She testified that she had some difficulty conveying to the sketch artist that the intruder was very light skinned.

While she was unsure if she saw them before or after she helped with the composite, she did see the surveillance photos. The man depicted in them had a hooded jacket over his head the way her intruder did and was wearing light gloves similar to the ones the intruder wore. Upon seeing the photos, she was pretty sure the man depicted was the intruder in her residence. There was, however, no immediate suspect.

In April-May, 2005, Rochelle Campbell lived at [Address Omitted] in Newark. She lived there with four children, three of whom were by the defendant. She was pregnant and due in June, with a fourth child of his. She had known Cooke for about ten years since first meeting in [sic] him Salem, New Jersey. In the period of April and May, Cooke stayed at [Address Omitted] about two-thirds of the time. At this time he was thirty-four years old.

Early in the evening of the [sic] April 29th she, the children, and Cooke were watching television.

She fell asleep but then went upstairs to bed. Several hours later, she came downstairs. Cooke was there. She saw a panty liner and a backpack. It had a name tag on it with "Amalia" and a Spanish last name. Cooke told her he had taken it at an accident scene when the participants were not looking.

In Campbell's presence, Cooke removed the contents which included a cell phone, an "iPod," receipts and some diet pills in a silver and black metal container. She suggested that he call one of the numbers on and [sic] the cell phone and return it. He did not. She believes she saw Cooke with two credit cards. He said he was going to use one rejecting her request not to. He speculated that the credit card PIN number may be on the receipts in the backpack.

Campbell told him to take away the backpack along with the credit cards and not bring them back. He left. When he came back, he did not have the backpack, nor did she see the credit cards again. He told Campbell he had tried to use a credit card but it would not work. Campbell later saw the ATM pictures and said they showed Cooke. The Wilmington Trust ATM is about a half mile from [Address Omitted].

The back of [Address Omitted] is across from Towne Court Apartments. It is very close to the apartment where Cheryl Harmon lived in Building 11, and to the apartment where Lindsey Bonistall lived in Building 12. Building 12 has twelve apartments in it. As of April 30-May 1, 2005, eight of those 12 apartments were occupied. Lindsey Bonistall had

a roommate, Christina Bush, who was away camping with her father on that night. Cooke was at the [Address Omitted] residence during the day on May 1st, but Campbell does not know where he was during the evening.

Sometime around 2 a.m. on May 1st, Cooke climbed up the balcony in the Bonistall apartment. Apparently, he stepped on a meter box to make the climb; the balcony is easily reached by using it. It would appear he was able to "jiggle" open the poorly locked patio door leading into the apartment's living room. No fingerprints were found on the balcony railing or on the door, but glove type impressions were left on the railing.

Lindsey Bonistall, a University of Delaware sophomore, was present. She had been out earlier visiting with some school mates. While with them, she smoked some marijuana. She left them around 1 a.m. When these friends last saw her, she was wearing sweat pants, a University of Delaware sweatshirt, a blue "beer" cap, and flip flops. There were no stains on any of this clothing. Bonistall was due at her job at Home Grown in Newark the next morning, Sunday. The precise sequence of events once Cooke was in the apartment is not known. The condition of Bonistall's body, when later found, indicated she was still dressed in her sweat pants and sweatshirt that she had been wearing an hour or so before when with her friends. At some point, Cooke hit Bonistall hard at least twice, once around the left

eye and the other on her chin. There was sufficient time for bruising to develop before she died.

Cooke tied up Bonistall with an electrical cord, ripped from an iron in her bedroom. He forcibly put a t-shirt gag into her mouth. Her visible teeth marks were in it and she did that before she died.[3] There were injuries around and inside her mouth which indicate the gag was forcibly pushed in. Also there were injuries to Bonistall's chest consistent with someone's knees or body pressing firmly on it. Cooke placed another t-shirt, probably hers, around her neck, knotted it and strangled her to death.

Cooke raped Bonistall. DNA recovered from her vaginal area showed the odds of it being someone other than Cooke are 1 in 676,000,000,000,000,000,000 among African Americans.[4] She apparently scratched him, too. Fingernail scrapings recovered from her, because of the mixture of his and her DNA, showed the chances of them being someone other than Cooke to be 1 in 1,640,000,000 among the African-American population.[5] A FBI footwear examiner also testified he could not rule out boots of a brand sold by Payless as source of footwear imprints on a notebook on the floor in Bonistall's bedroom. Other brands could have made the impressions, however.

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[3] State's exhibits 119 and 155.

[4] State's exhibit 90.

[5] State's exhibit 91.

Bonistall's bed was all messed up, and in the sheets and in the jumbled bed covers, the police later recovered her flip flops and the "beer" cap. In her bedroom they recovered a small purple plastic flashlight[6] which did not belong to Bonistall or her roommate.

At some point, Cooked [sic] removed a bleach bottle from a front hall closet. Bonistall's upper garments had bleach type stains on them as did the "beer cap" her friends had seen her wearing just an hour or so before. Her panties were similarly stained. A cap for a bleach bottle was found in the front hallway and a bleach bottle was found at the foot of Bonistall's bed. The cap fit the bottle. Possible bleach stains were found on the comforter on her bed. The medical examiner testified bleach can be used to destroy DNA.

It is likely Bonistall was killed in bed. In any event, after raping and then strangling her to death, Cooke moved her body to the bathtub in the apartment bathroom. He placed it in there face down. He put pillows, a basket, and her guitar on top of her. He set her and all of this on fire. While portions of her legs and back were badly burned, she was dead before the fire started.

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[6] State's exhibit 146.

Before starting the fire, however, he wrote (mostly printing) some things on the walls, a door, and the kitchen countertop:

> "More Bodies Are going to be turn in (sic) up Dead"
>
> "WHITE Power" (in two places)
>
> "We Want Are (sic) weed back"
>
> "KKK" (on a wall and on a kitchen countertop)

All of this was done in large letters apparently with a blue magic marker. It was all written before Cooke started the fire as soot covered most of the writings. Georgia Carter, a Delaware State Police Crime Lab document examiner testified, that her comparison of Cooke's known writings and these "wall writings" led her to conclude there were "strong indicators" that Cooke "probably" did them. When attempting to get exemplars from Cooke, he told her, however, he did not print, but known documents the police obtained elsewhere showed he could print.[7]

Cooke apparently found Bonistall's wallet. When in relation to her death is not known. He spread out her credit and ID cards in a nice playing card fashion on the kitchen counter. No prints were recovered, however.

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[7] *State v. Cooke*, 914 A.2d 1078 (Del.Super.2007); State's exhibit 73-77.

The fire he started in the bathtub burned for quite a while until smoke came out of the apartment awakening residents, all of whom had to evacuate. The fire melted the walls above the bathtub some of which fell in covering her body. The local fire company was called and all the residents evacuated the two and a half story apartment building.

Campbell said Cooke did not own a car. He either rode the bus or his bike. Judy Romeo lives at [Address Omitted] which is part of a row of town-houses. There is a parking lot in the back of her house. It abuts the Edna Dickey Park as does, on the opposite side several hundred feet away, Building 12 of the Towne Court Apartments. Sometime after 1:00 a.m. on the 1st, Romeo left her apartment to go out back to smoke. A man she said resembled Cooke rode by on a bike. His hair was in "corn rows," pulled back and he had braids like Cooke. When she went back inside she mentioned it to her son. A little while later, Romeo heard sirens. She went outside and saw flames and smoke coming from the Towne Court Apartments.

Aetna Hose and Ladder Company responded to the fire. After having some difficulty getting into the apartment, due to a draft created by the fire, firemen entered and put out the blaze. It was not until hours later that Bonistall's body was found under the ashes in the tub.

At 5:42 p.m. on May 2nd the Newark Police received a 911 call. As of that time, the Harmon,

Cuadra, and Bonistall incidents described above had not been linked. Nor had the police released information about the wall writings in Harmon's apartment, her name, any information about Carolina's name or that Bonistall had been tied up.

Campbell[8] later identified the caller as Cooke. At trial, she said Cooke disguised his voice using the voice he sometimes used when speaking to their young children. Among statements Cooke made in this tape linking him to the three incidents, and the incidents to each other, were references to Carolina (pronouncing it "Caroleena" as Cuadra had), "Cheryl,"[9] *tying* up that girl, the murder, and KKK on Bonistall's apartment walls. Again, none of this had been public information.

Several days later in another 911 call to the Newark Police, Cooke (whose voice again Campbell identified) sent the police on a wild goose chase to Chester, Pennsylvania, to find the alleged murder culprits. He used the name in the call of "John Warn." He described himself as thirty-two and [C]aucasian.

In early May, the police developed a wanted poster with a $25,000 reward. The poster depicted the sketch drawing worked out by Cuadra and the police

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[8] *See* p. 6, *supra*.

[9] *See* reference to two rings taken from her apartment with her name on them, p. 3.

artist. It also showed four pictures from the ATM surveillance camera. The wanted poster was placed in stores and other locations in and around Newark.

One of those locations was the Payless Shoe store in Newark at College Square. Cooke worked there in early 2005. He worked several days a week in the stock room where he used a box cutter and gloves.[10] To get to the stock room, he had to come in the front door. Cooke worked on April 28, 29, and May 3, 5, and May 10, 2005.[11]

The Newark Police asked Diane Hannah, the store manager, to put up the original wanted poster.[12] It was distributed around Newark starting on May 4th. Hannah testified that when she got this version, she did not pay too much attention to it. She put it in the front of the store just to the right of the front door. The last day Cooke worked at Payless was May 10th. He was scheduled to work the rest of the week. But Cooke claimed his mother was sick and could not come in. He never returned to work. A day or two previous, the wanted poster had disappeared.

The police distributed a second wanted poster.[13] It had the same earlier composite, but it now had six pictures from the ATM camera. One of the six

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[10] State's exhibit 63.

[11] State's exhibit 63.

[12] State's exhibit 64.

[13] State's exhibit 56.

appeared in the earlier poster but a new picture showed Cooke's left sneaker. The two new ATM pictures also showed Cooke walking toward and away from the ATM machine. Two of the pictures show him wearing gloves.

Hannah recognized some distinct features from the six ATM photographs on the second poster. One, she knew Cooke walked on his "tippy toes." The pictures of Cooke walking to and away from the ATM would indicate a person walking on his tippy toes. Two, she said that she had seen Cooke wear sneakers like the ones in the ATM pictures.

Believing that the person in the wanted person [sic] was Cooke, she called James Jones. He is a training supervisor at the Prices Corner Payless Store and who had hired Cooke in the first place. Cooke started his employment at the Prices Corner store. Jones, like Hannah, had seen Cooke ride a bike to his work at the College Square store. Jones had also driven Cooke to other Payless Stores.

After Hannah's call to him, Jones looked at the poster. He testified he recognized the person shown as Cooke. He recognized the gloves, which he had seen Cooke have at work; the sneakers, which appeared to be the Payless brand; the way his legs were bent; the "tippy toe" walking which he knew Cooke did because he had told him that he had been burned on his feet when younger; and Cooke's facial profile.

The Newark Police were called and the investigation thereafter focused on Cooke.[14] Cooke was arrested in Delaware in early June, 2005. He had something on him unrelated to these offenses but linking him to a crime in Atlantic City which will be covered later.[15]

The defense to all the charges was guilty, but mentally ill.[16] This defense is not what Cooke himself wanted as he himself said when testifying. Dr. Lawson Bernstein, a defense psychiatrist, also related that Cooke told him he was not mentally ill. Cooke stated several times he wanted to plead not guilty. This dispute was the subject matter of a writ of mandamus sought by the State.[17]

As factual support to the defense of guilty, but mentally ill, counsel called various witnesses. One was Ricky Patillo, Jr., who is a half-brother of Cooke's and is fourteen months younger. There were three other siblings in the household besides these two. Patillo said all of them moved twelve or more times

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[14] Other persons who knew Cooke, such as Campbell, Jesse Sitz-Romeo's son who had seen him in Dickey Park, Latoya Dowes, who lived on Madison Drive which abuts that park, all saw the poster and said it was Cooke based on their prior observations of him.

[15] *Infra* pp. 40-41.

[16] 11 *Del. C.* 401(b).

[17] *In re Petition of State for a Writ of Mandamus*, 918 A.2d 1151 (Del.2007).

as they were growing up; "no childhood home," is how he described it.

Ricky Patillo, Sr., Patillo, Jr.'s father, lived with Cooke's mother and the children for a while. Ricky, Sr., according to Ricky, Jr., treated Cooke worse than the others. He beat Cooke with hoses, switches and electrical cords. He cursed Cooke often and used demeaning words toward him.

Cooke's mother, Paula Turner, was nineteen when he was born on December 2, 1970, and he was born pre-mature around three and a half pounds.[18] He was treated for malnutrition when only a few months old.[19] She was not a good provider nor were any of her revolving door boyfriends. The kids, Ricky, Jr. said, often had to fend for themselves. He and Cooke stole food and sometimes went through a diner's trash for doughnut remnants, but he also admitted Cooke committed burglaries or thefts for non-food items.[20] Cooke often went to school hungry. While Patillo testified that Turner "did the best she could," he recalled a time he kicked open a bathroom door (he was fifteen or sixteen) and found her on the floor with a needle in her arm and a strap around it. At one time, Turner was incarcerated and the kids lived with a grandmother.

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[18] Defendant's exhibit 5.

[19] Defendant's exhibit 6A.

[20] For a detailed description of his criminal record, *see* Attachment A.

Patillo described Cooke as a comic inside the family, but "strictly solo" outside it. Cooke was the "least loved" of the kids. Patillo recalls Cooke being in special education and being ridiculed with the name "short buzz" (for slow people). Cooke had a lot of trouble in school. He was involved in fights. He showed up in dirty and soiled (from urine) clothes. He was suspended many times. He had few friends.

Karlene Sorrell, a cousin, testified that Cooke was not getting love from Paula Turner. She never saw Cooke get hit, but she later saw welts and bruises from being hit. Turner's children, including Cooke, had unpleasant body odor, and not very good clothes. She described how Cooke became depressed and withdrawn after the death of one of his sons, Semaj (not a child of Campbell's).

Eleisa Cooke, his half-sister, testified. She is now thirty-seven. She reiterated what Patillo had said about the frequent moves made as they were growing up. Their mother, Turner, consumed illegal drugs and was often not around. Turner subjected Cooke to a lot of abusive name calling.

The most notable early childhood trauma, however, was when, apparently, Ricky Patillo, Sr., put Cooke's feet into a bathtub of scalding water. He was severely burned but Turner did not seek immediate treatment. This happened when he was just over two. For a time Cooke said a sibling dipped his feet in but

that was not true. Ultimately, somehow, he was sent to the Children's Hospital of Philadelphia (CHOP).[21] He was first seen in June 1973 and treated numerous times over the next year and a half, mostly for skin graphs [sic] and complications. And he was not well-nourished when he first was admitted. He has never completely healed. Patillo, Jr., and Eleisa reported the injuries prevented him from playing "normal" games with kids as he was growing up and caused him from then on to walk in a "tippy toe" manner; a condition which exists now.

The defense evidence in the guilt phase of the trial included voluminous records from the New Jersey Division of Youth and Family Services (DYFS).[22] These records reveal a long history of abuse of Cooke, often by his mother and by others. They reveal his many delinquency findings and school disciplinary problems. At one point, he was placed in a foster home because things were so bad with Turner. One time after beating him, she brought Cooke to the DYFS office, admitted to beating him because of school problems and left him at the DYFS Office. Her abuse and neglect were documented in a complaint

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[21] Defendant's exhibit 7.

[22] Defendant's exhibit 6. Because this exhibit and other defense exhibits (5, 7, 10, and 11) were examined by and relied upon by the defense mental status experts, they were provided in full to the State for its expert to examine. This explains why some records arguably helpful to the State and not the defendant, are cited in this opinion.

for temporary custody filed when Cooke was fourteen.[23] This led to a temporary removal from the "home."

Dr. Alvin Turner, a psychologist visited, tested and examined Cooke. He saw him for about twenty hours over six occasions: January 20, February 3, February 17, April 14, April 21, and May 5, 2006. His ultimate diagnosis was that Cooke was suffering from a long-standing Schizotypal Personality Disorder (SPD).[24] This Disorder, Dr. Turner opined, at the time of the offenses substantially disturbed Cooke's thinking, feeling, and behavior, and left him with insufficient willpower to exercise a conscious choice in doing a particular act or refraining from it.

The diagnostic criteria for this Disorder are:

A. A pervasive pattern of social and interpersonal deficits marked by acute discomfort with, and reduced capacity for, close relationships as well as by cognitive or perceptual distortions and eccentricities of behavior, beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) or the following:

(1) ideas of reference (excluding delusions of reference)

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[23] *Id.* at Bates #'s 001200-001203.

[24] *Diagnostic and Statistical Manual of Mental Disorders IV-TR*, American Psychiatric Association, 2000; DSM 301.22, p. 697.

(2) odd beliefs or magical thinking that influences behavior and is inconsistent with subcultural norms (e.g., superstitiousness, belief in clairvoyance, telepathy, or "sixth sense"; in children and adolescents, bizarre fantasies or preoccupations)

(3) unusual perceptual experiences, including bodily illusions

(4) odd thinking and speech (e.g., vague, circumstantial, metaphorical, overelaborate, or stereotyped)

(5) suspiciousness or paranoid ideation

(6) inappropriate or constricted effect

(7) behavior or appearance that is odd, eccentric, or peculiar

(8) lack of close friends or confidants other than first-degree relatives

(9) excessive social anxiety that does not diminish with familiarity and tends to be associated with paranoid fears rather than negative judgments about self

B. Does not occur exclusively during the course of Schizophrenia, a Mood Disorder With Psychotic Features, another Psychotic Disorder, or Pervasive Developmental Disorder.[25]

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[25] Defendant's exhibit 17.

Dr. Turner said Cooke had a number of risk factors for this personality disorder starting from birth and through his youth. They included his premature birth (born prior to full brain development), early malnourished existence; the serious burning incident, physical abuse, including the burning incident, all for which Cooke feels much rage, including toward his mother; verbal abuse from his mother and paramours; physical and emotional neglect which can be extremely damaging to children; poor school performance; lack of intact home (moving twelve times, etc.); lack of nurturing; lack of a father figure; self-consciousness about his learning disabilities, especially being in special education; suffering sex abuse while in juvenile detention; parental favoritism to others; foster care; and seeing criminality of his mother and siblings. Further, Cooke had no resources to help him cope with or compensate for these things.

Dr. Turner discussed Bonistall's death with Cooke. Cooke, Dr. Turner testified, told him different things at different times. Some of the things he said were: that he had consensual sex with Bonistall, that she had that sex after smoking "wet;"[26] that Bonistall did not like it; that he got angry with her because she did not put her legs up while having sex; that she

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[26] "Wet" is marijuana which has been dipped or soaked in formaldehyde or PCP. A toxicology examination of Bonistall's blood revealed traces of marijuana but no formaldehyde or PCP. In short, there was no corroboration she had smoked "wet."

wanted to do it her way, not his; and that he recalled choking her while they were on her bed. Cooke also said he did not plan on this, that he did know why it was him, and that he could not believe it was happening. On cross-examination, Dr. Turner said Cooke told him he could sense evil in Bonistall, he knew her to be unhappy, and that she was not what people thought of her.

Dr. Turner also testified that Cooke at times denied saying any of this to him. He felt Cooke was "playing" with him. Paradoxically, all of these inconsistencies, Dr. Turner said, are consistent with SPD in that Cooke would go in and out of reality. He described SPD as a "severe" "transient psychotic state." It is characterized by impulsiveness where one becomes unable to control severe acting out behavior.

Dr. Turner reviewed the nine diagnostic criteria of SPD[27] and testified how Cooke exhibits all of them. Dr. Turner described how Cooke believes he is a "chosen person;" that Satan whispered things to him, but that he – Cooke – was an avenger of evil; that he believes he can predict the future; the senseless things he said to him; his distrust; his confessing to the murder of Bonistall; feeling shame from the sexual and child abuse he had suffered;[28] his flat

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[27] *Supra* pp. 18-19.

[28] Dr. Turner said Cooke was tearful at times when discussing the abuse he had suffered. He testified, this is inconsistent with being anti-social.

affect but at times tearful; how he decides what to know or not know; lack of close friends and confidants; and lack of eye contact.

Dr. Turner testified about his review of Delaware Department of Correction records concerning an incident in early September 2005, three months after Cooke's incarceration for these charges. A corrections officer observed Cooke writing on the wall of his cell with feces. He also saw Cooke take it from a cup and put it close to his mouth.[29] As a result of this, Cooke was taken to the infirmary. Department of Correction records[30] indicated the staff was concerned Cooke may kill himself, reported he was hearing a baby crying, and other matters. He was placed under close personal observation and prescribed anti-psychotic medication. He was diagnosed as suffering from a "psychosis not otherwise specified."[31] In sum, Dr. Turner said, another mental health provider was seeing psychotic episodes.

When cross-examined, Dr. Turner was asked about personality disorders. First, he said, the risk factors Cooke had as a person under 18 put him at risk for a personality disorder, not just SPD. Second,

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[29] There is no report that Cooke ate his feces or that he became physically ill and/or had to be treated for ingestion of feces.

[30] Defendant's exhibit 10.

[31] Defendant's exhibit 10C.

however, he opined that Cooke did not have Anti-Social Personality Disorder (ASPD) even though the risk factors he reviewed earlier put a young person at risk for ASPD, too.

He was asked about Cooke's extensive criminal history, both as an adult and as a juvenile.[32] He was asked about Cooke's post-murder crimes in Atlantic City in early June 2005, a month after the murder.[33] He was also questioned about Cooke's fathering ten children by seven different women. None of this changed his conclusion about his diagnosis of Cooke's SPD.

The purpose of this cross-examination was to address the features of ASPD which Dr. Turner had ruled out. He was asked about psychological evaluations performed on Cooke while serving a jail sentence in New Jersey. Cooke was in his early 20's. Both psychologists noted his antisocial personality and specifically noted ASPD.[34] Dr. Turner noted, however, he was the first mental health provider to diagnose Cooke with SPD.

The State reviewed with Dr. Turner the diagnostic criteria for ASPD:

> Diagnostic criteria for 301.7 Antisocial Personality Disorder

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[32] *Supra.* p. 17, *infra.* pp. 74-75.

[33] *Infra.* pp. 40-41.

[34] State's exhibit 183.

A. There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following:

(1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest

(2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure

(3) impulsivity or failure to plan ahead

(4) irritability and aggressiveness, as indicated by repeated physical fights or assaults

(5) reckless disregard for safety of self or others

(6) consistent irresponsibility, as indicted by repeated failure to sustain consistent work behavior or honor financial obligations

(7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another

B. The individual is at least age 18 years.

C. There is evidence of Conduct Disorder with onset before age 15 years.

D. The occurrence of antisocial behavior is not exclusively during the course of Schizophrenia or a Manic Episode.[35]

Dr. Turner agreed that Cooke had a lot of criminal history but minimized any deceitfulness, agreed he was impulsive, had set fire to an apartment building, minimized the ASPD criterion of financial irresponsibility even though Cooke owed more than $12,000.00 in back child support, showed some signs of violence, but did appear remorseful at times, contrary to that ASPD criterion. Cooke, of course, is over eighteen. Dr. Turner disagreed with criteria C, that there was evidence of conduct disorder prior to age 15.[36]

When Cooke was 13, Dr. Octavio Muniz gave a tentative working diagnosis of "Conduct Disorder Undersocialized Aggressive."[37] Dr. Turner, said however, he was not going to agree that there was evidence of Conduct Disorder in all the records and reports concerning Cooke's youth.

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[35] State's exhibit 178. While the criteria were displayed for the jury during cross-examination, they were later placed into evidence by the State.

[36] The two defense experts and the State's one expert all agreed that DSM personality disorders about which they opined are not or cannot be diagnosed before the age of 18.

[37] Defendant's exhibit 6, Bates # 1294. So that the record is clear, all documents each side relied upon in connection with its experts' opinions were shared with the other side.

A psychiatrist, Dr. Lawson Bernstein, examined Cooke on June 13, 2006. His opinion was that Cooke, based on his traumatic history, developed a Mixed Personality Disorder with a mixture of Schizoid/ Schizotypal and Paranoid features.[38] This condition was not brought on by consuming "wet" on the occasion of the murder and existed separate and apart from anything that may have been brought on by "wet."[39] It is not a psychotic condition but a chronically dysfunctional way of dealing with the world, he said.

Dr. Bernstein's opinion started with the general category of a Personality Disorder Not Otherwise Specified:

> 301.9 Personality Disorder Not Otherwise Specified
>
> This category is for disorders of personality functioning (refer to the general diagnostic criteria for a Personality Disorder on p. 689) that do not meet criteria for any specific Personality Disorder. An example is the presence of features of more than one specific Personality Disorder that do not meet the full criteria for any one Personality Disorder ("mixed personality"), but that together cause clinically significant distress or impairment in one or more important areas of functioning (e.g., social or occupational). This

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[38] *See* Defendant's exhibit 14.

[39] *Id.*

> category can also be used when the clinician judges that a specific Personality Disorder that is no [sic] included in the Classification is appropriate. Examples include depressive personality disorder and passive-aggressive personality disorder (*see* p. 789 and p. 791, respectively, for suggested research criteria).[40]

He then went on to Schizoid Personality Disorder since Cooke has, he opined, some features of this, but not all:

> Diagnostic criteria for 301.20 Schizoid Personality Disorder
>
> A. A pervasive pattern of detachment from social relationships and a restricted range of expression of emotions in interpersonal settings, beginning by early adulthood and present in a variety of contexts, as indicated by four (or more) of the following
>
> 1. neither desires nor enjoys close relationships, including being party of a family
>
> 2. almost always chooses solitary activities
>
> 3. has little, if any, interest in having sexual experiences with another person

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[40] DSM-IV-TR 301.9, p. 729.

4. takes pleasure in few, if any, activities

5. lacks close friends or confidants other than first-degree relatives

6. appears indifferent to the praise or criticism of others

7. shows emotional coldness, detachment, or flattened affectivity

B. Does not occur exclusively during the course of Schizophrenia, a Mood Disorder With Psychotic Features, another Psychotic Disorder, or a Pervasive Developmental Disorder and is not due to the direct physiological effects of a general medical condition.

Note: If criteria are met prior to the onset of Schizophrenia, add "Premorbid," e.g., "Schizoid Personality Disorder (Premorbid)."[41]

Dr. Bernstein believed Cooke met criteria 1-5, and 7, but he said he lacked sufficient information to see if Cooke met criteria six. Cooke's solitariness, lack of close friends, etc., have been discussed. How Cooke meets criterion three in light of his many sexual experiences, he thought was a contradiction to that criterion. Dr. Bernstein mentioned, as did Dr. Turner, Cooke's pervasive religious views and taking from religion references to himself. He said it was not

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[41] *Id.*, 301.20., p. 697.

delusional, though Cooke used flowery "pseudo-biblical language" in strange ways when writing.

Dr. Bernstein then reviewed the diagnostic features of a Paronoid [sic] Personality Disorder:

> Diagnostic criteria for 301.0 Paranoid Personality Disorder
>
> A. A pervasive distrust and suspiciousness of others such that their motives are interpreted as malevolent, beginning by early adulthood and present in a variety of contexts, as indicated by four (or more) of the following:
>
> 1. suspects, without sufficient basis, that others are exploiting, harming, or deceiving him or her
>
> 2. is preoccupied with unjustified doubts about the loyalty or trustworthiness of friends or associates
>
> 3. is reluctant to confide in others because of unwarranted fear that the information will be used maliciously against him or her
>
> 4. reads hidden demeaning or threatening meanings into benign remarks or events
>
> 5. persistently bears grudges, i.e., is unforgiving of insults, injuries, or slights
>
> 6. perceives attacks on his or her character or reputation that are not

apparent to others and is quick to react angrily or counterattack

7. has recurrent suspicions, without justification, regarding fidelity of spouse or sexual partner

B. Does not occur exclusively during the course of Schizophrenia, a Mood Disorder With Psychotic Features, or another Psychotic Disorder and is not due to the direct physiological effects of a general medical condition.[42]

He did not have enough information, he said, to determine if Cooke met criteria 5, 6, and 7. He noted Cooke avoided relationships and lacked empathy. He, Cooke, also felt betrayed by the various mothers of his children whom he believed cheated on him. When speaking of the lack of relationships, Dr. Bernstein referred to a report from Dr. Priscilla Bright of November 8, 1983 (Cooke was just short of 13). She, Dr. Bernstein testified, referred to Cooke's "avoidance of relationships."[43] As to Cooke's writing on the walls in the Harmon and Bonistall apartments, setting the fire to Bonistall's body, and using bleach, Dr. Bernstein told the jury that, even if one is mentally ill, one can take conscious efforts to avoid being caught.

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[42] *Id.*, 301.0, p. 694.

[43] Defendant's exhibit 6F.

The doctor also related that Cooke had said he was smoking "wet" during the period involved in this case, late April, early May 2005. He told Dr. Bernstein Bonistall had smoked it too. Dr. Bernstein testified that he found it "unbelievable" that Cooke had consensual sex with Bonistall.

Dr. Bernstein described Cooke as a "very anti-social guy." Cooke has substantial anti-social features in his personality disorder. But Dr. Bernstein said, Cooke did not meet the diagnostic criteria for ASPD. He stated that Dr. Stephen Mechanick's diagnosis of ASPD was "overly reductionistic" and that too many things did not fit.

He also said, however, if one went strictly by the DSM-IV-TR criteria for ASPD, Cooke meets them. But, Dr. Bernstein said that would be looking at a complex case in a vacuum. He disagreed with Dr. Turner's diagnosis of SPD since Cooke does not meet all of its criteria.

Dr. Bernstein testified that the personality disorder with which he diagnosed Cooke substantially disturbed Cooke's thinking, feeling, or behavior at the time of the offenses. He also said, however, these disorders did not put Cooke within a psychiatric disorder that left him with insufficient willpower to choose whether be [sic] should do the act or refrain from it although physically capable.[44]

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[44] *See* 11 *Del. C.* § 401(b).

Cooke chose to testify (contrary to counsel's advice). He did so in narrative fashion.[45] He told the jury that he did not approve of the mental illness defense that his lawyers were presenting. "I didn't kill this person," he testified. Dr. Bernstein was "pushing" what his lawyers (not he) wanted. He claimed the prosecutor was railroading him; that the Payless employees (Jones and Hannah) testified only to get the reward; the police had threatened Campbell; the case was a set-up because he had sex with Bonistall; this was a racial case; he is not mentally ill, and the judge knows it; Bonistalls's parents do not want to accept her behavior; he left his Payless job due to disability; he discussed the boot print evidence; and accused the State of evidence tampering and more.

Since Bonistall had her clothes on, Cooke questioned how she could be raped. He said, if convicted, it would be on the basis of "false evidence." On the issue of "wet," he said Bonistall only smelled the smoke but held nothing. He denied telling Dr. Turner what he had said Cooke told him about "wet." He basically ended his cross-examination to say to express remorse is to say you are guilty.[46]

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[45] *Shockley v. State*, 565 A.2d 1373 (Del.1989).

[46] During his testimony, the Court excused the jury several times. He had violated the restrictions, even as broad as they were, about what he could offer as relevant evidence. Upon returning each time, the jury was given cautionary instructions.

State's Rebuttal

The State's rebuttal basically fit into two categories. First, was the testimony from Dr. Mechanick. Second, was testimony from several victims of Cooke's criminal acts years before the murder and his crimes in Atlantic City committed about thirty-five days after Bonistall's murder.

Earlier it was noted[47] that Dr. Bernstein had said (1) diagnosing Cooke with ASPD was "overly reductionistic," but (2) staying with DSM-IV-TR, Cooke met the diagnostic criteria of ASPD.

It was Dr. Mechanick who diagnosed Cooke with ASPD. For clarity's sake, it is helpful to repeat the diagnostic criteria for ASPD:

> Diagnostic criteria for 301.7 Antisocial Personality Disorder
>
> A. There is pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following:
>
> 1. failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest
>
> 2. deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure

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[47] *Supra* p. 28.

3. impulsivity or failure to plan ahead

4. irritability and aggressiveness, as indicated by repeated physical fights or assaults

5. reckless disregard for safety of self or others

6. consistent irresponsibility, as indicted by repeated failure to sustain consistent work behavior or honor financial obligations

7. lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another

B. The individual is at least age 18 years.

C. There is evidence of Conduct Disorder with onset before age 15 years.

D. The occurrence of antisocial behavior is not exclusively during the course of Schizophrenia or a Manic Episode.[48]

As had Doctors Bernstein and Turner, Dr. Mechanick read the voluminous records from New Jersey,[49] the CHOP hospitalization records,[50] the

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[48] DSM-IV-TR, State's exhibit 178.

[49] Defendant's exhibits 6 and 11.

[50] Defendant's exhibit 7.

Salem Memorial Hospital records,[51] the Delaware Department of Correction records,[52] and many other records. He issued two reports.[53] He interviewed Cooke on September 25, 2006.

Dr. Mechanick's first explained why Cooke did not meet the diagnostic criteria for SPD:[54]

1. Ideas of reference: Cooke's taking of ideas from the Bible and applying them to himself was not done in an unusual way.

2. Odd beliefs: there was a little bit of this but having a sixth sense is not really it. His claims of meeting Bonistall before the murder could not be confirmed.

3. Unusual perceptual experiences: There were no pre-arrest records of Cooke having delusions, delusional beliefs or disorganized thoughts. His statement to Dr. Turner about speaking with Satan Dr. Mechanick viewed as an internal conflict over what to do. Nor did Dr. Mechanick note any evidence of hallucinations. When asked on cross about the September 2005 report of Cooke saying he heard a baby crying, Dr. Mechanick said such "voices" usually

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[51] Defendant's exhibit 5.

[52] Defendant's exhibit 10.

[53] State's exhibit 176 and 177.

[54] *See supra* pp. 18-19.

give directions (do or not do something). The baby's crying did not.

4. Odd thinking and speech: Dr. Mechanick saw none. Cooke's flowery language does not meet this diagnostic criterion; there needs to a more profound disorganization.

5. Suspiciousness or paranoid ideation: this should be an excessive and unreasonable mistrust of others. Here in a capital case with a gruesome murder, it would not be unusual for a person to be suspicious of the police and prosecution and any others who did not accept his protestations of innocence.

6. Inappropriate affect: Dr. Turner had noted a flat affect. But Dr. Mechanick said Cooke ran "hot and cold." Cooke expressed anger. All three experts had viewed a four hour plus Newark Police interview with Cooke during which he was often quite animated.[55]

7. Odd behavior or appearance: he saw none of that in Cooke.[56]

8. Lack of close friends/confidants: Dr. Mechanick said he received limited

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[55] The full video was not shown to the jury; nor did anyone request that it be shown.

[56] Cooke was usually in civilian clothes in court and looked pretty much as shown in his mug shot. State's exhibit 103.

information from Cooke on this matter. He noted his frequent sexual relationships demonstrated social skills. Also, as two neighbors (Sitz and Taylor) had reported they saw Cooke playing basketball in Dickey Park with others. All of this, Dr. Mechanick said, is inconsistent with this criteria.

7. Excessive social anxiety: this means a feeling of lack of comfort or fear for safety in public and low self-esteem. Dr. Mechanick saw none of this in Cooke based on the records and his interview.

In sum, Dr. Mechanick said, there is no pervasive pattern of SPD in Cooke's life as the criteria for this disorder require. Having consensual sex and killing Bonistall does not show SPD, which would substantially affected [sic] his thinking, nor did it mean Cooke had insufficient willpower to do or refrain from doing the rape and murder.

Dr. Mechanick ruled out Dr. Bernstein's diagnosis which included features of Schizoid Personality Disorder (SPD):[57]

A *A pervasive pattern of detachment from social relationships and a restricted range of expression of emotions in interpersonal settings beginning by early adulthood and present in a variety of*

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[57] DSM-IV-TR, 301.20, p. 697.

contexts, as indicated by four (or more) of the following:

He agrees that there is some evidence that Cooke has a detachment from social relationships. But because there are records he was in a gang or gangs when younger and because of so many sexual relationships, he cannot be sure this diagnostic criteria is met.

(1) *Neither desires nor enjoys close relationships, including being party of a family; (2) and almost always chooses solitary activities.*

The records did not support a choice of solitary activities or an isolated person.

(3) *Has little, if any, interest in having sexual experiences with another person.*

His many children by six or seven women belie this criteria.

(4) *Takes pleasure in few, if any, activities.*

There is little evidence to say he takes pleasure in few activities.

(5) *Lacks close friends or confidants other than first-degree relatives.*

The records on close friends are insufficient to say one way or the other if this criterion is met.

(6) *Appears indifferent to the praise or criticism of others.*

Cooke is reactive, and does appear indifferent.[58]

(7) *Shows emotional coldness, detachment, or flattened affectivity.*

Cooke is quite emotional discussing his case. This criterion is not the same as lack of remorse.[59]

Dr. Mechanick went on to say that Cooke's interest in sex with Bonistall and Cuadra is not typical of schizoid personality disorder. If, as Cooke claimed, Bonistall refused to perform a sex act as he wanted, a person with this disorder would not care (i.e., would not commit murder for that reason).

He summed up his opinions in this regard that he could not find any features of schizoid personality disorder in Cooke; nor did his history show a pervasive pattern of any of these features. But even if he had it at the time of the offenses, Dr. Mechanick said it did not substantially affect his thinking or willpower.[60]

Dr. Mechanick also ruled out Dr. Bernstein's diagnosis that Cooke met several of the criteria of Paranoid Personality Disorder:

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[58] During his narrative on direct and cross-examination, the jury saw for itself this criterion is inapplicable.

[59] Compare to ASPD 301.7 A(7), *supra* p. 23; and refer to footnote 58.

[60] 11 *Del. C.* § 401(b).

A *A pervasive distrust and suspiciousness of others such that their motives are interpreted as malevolent, beginning by early adulthood and present in a variety of contexts, as indicated by four (or more) of the following:*

This means excessive and unrealistic mistrust of others' motives. As Dr. Bernstein formed the opinion from his prison visit to Cooke, such a setting is natural for becoming mistrustful.

(1) *Suspects, without sufficient basis, that others are exploiting, harming, or deceiving him or her.*

He saw little evidence of this in the voluminous pre-arrest records: selling drugs, many motor vehicle charges, and many arrests since age fifteen.

(2) *Is preoccupied with unjustified doubts about the loyalty or trustworthiness of friends or associates.*

Perhaps Cooke was pre-occupied by Campbell but not by all of his earlier lady friends. As there were crimes in which he had co-defendants this criterion is ruled out.

(3) *Is reluctant to confide in others because of unwarranted fear that the information will be used maliciously against him or her.*

Cooke is guarded in his conversation but being guarded is not this criterion; he is not unusually suspicious.

(4) *Reads hidden demeaning or threatening meanings into benign remarks or events.*

Dr. Mechanick saw no historical evidence of this in the many records.

(5) *Persistently bears grudges, i.e., is unforgiving of insults, injuries, or slights.*

There is no historical evidence that Cooke holds long-term grudges.

(6) *Perceives attacks on his or her character or reputation that are not apparent to others and is quick to react angrily or counterattack.*

The attacks Cooke perceives are nothing more than the charges for which he is on trial.

(7) *Has recurrent suspicions, without justification, regarding fidelity of spouse or sexual partner.*

There was a little evidence to suggest he had some doubts about the fidelity of some of the women who were mothers of his children. But what Dr. Mechanick found did not rise enough to meet this criterion.

Even assuming, Dr. Mechanick testified, that Cooke had Paranoid Personality Disorder, it did not substantially affect his thinking or willpower (or meet any other aspects of the statute on guilty, but

mentally ill),[61] but he opined that Cooke did not have this disorder anyway.

Dr. Mechanick's diagnosis was that Cooke met the necessary criteria of Anti-Social Personality Disorder:[62]

> A *There is a pervasive pattern of disregard for and violation of the rights of others occurring since age fifteen years, as indicated by three (or more) of the following.*
>
> He said there was a pervasive pattern since age fifteen of more than three of the following:
>
> (1) *Failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest.*
>
> Cooke's extensive criminal record, arrests and convictions decidedly meet this criterion.[63]
>
> (2) *Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure.*
>
> Dr. Mechanick saw limited evidence of this.
>
> (3) *Impulsivity or failure to plan ahead.*

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[61] 11 *Del. C.* § 401(b).

[62] DSM-IV-TR, 301.7, p. 706.

[63] State's exhibit 184.

There is some evidence for both parts of this criteria: so many children by so many women; no life plan; not caring for his many children, and there is some impulsivity in the circumstances of Bonistall's murder, such as the means used to kill her was something he did not bring in to her apartment.

(4) *Irritability and aggressiveness, as indicated by repeated physical fights or assaults.*

Campbell mentioned to Dr. Turner about physical abuse by Cooke, and she called the police about it, too. There is also history of assault convictions.[64]

(5) *Reckless disregard for safety of self or others.*

There is limited evidence, Dr. Mechanick said, of the reckless disregard for other's safety outside the circumstances of the charges in this case.

(6) *Consistent irresponsibility, as indicted by repeated failure to sustain consistent work behavior or honor financial obligations.*

Cooke met this criterion because he was behind in most of his child support obligations. He did not have a stable work pattern. All of this was long-term.

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[64] *Id.*

(7) *Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.*

In speaking with Cooke, he never expressed remorse for any of his past crimes. Cooke shifted to Bonistall some of the responsibility of what happened by claiming she was promiscuous, one or more of those men killed her, she consumed drugs, she even sought to buy from him,[65] her alleged failure to comply with his sexual demands, did not know how this happened, etc. Dr. Mechanick saw similar blame shifting in Cooke's prior psychological and other records.

Dr. Mechanick also noted that in 1993, when Cooke was twenty-two, he was diagnosed with ASPD.[66]

B *The individual is at least age 18 years.*

Cooke was thirty-five when Dr. Mechanick interviewed him. Clearly he met the criteria of being over eighteen.

C *There is evidence of Conduct Disorder with onset before age fifteen years.*

Dr. Mechanick saw records where Cooke was diagnosed with Conduct Disorder before

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[65] State's exhibit 176, p. 17.

[66] State's exhibit 183. Evaluation by a New Jersey prison psychologist, Dr. Robert Hopkins.

> Cooke was fifteen.[67] The other records from Cooke's youth[68] confirmed Dr. Mechanick's independent opinion that a pre-15 Conduct Disorder diagnosis was appropriate. He noted some other pre-15 diagnosis in the records.

Using the prosecutor's description that Cooke's childhood was "horrible," Dr. Mechanick concurred in the obvious that it put Cooke at higher risk for an adult personality disorder. Dr. Mechanick testified Cooke in late April, early May 2005 did not have a psychiatric disorder that either substantially affected his thinking, feeling, etc., or which left him with insufficient willpower to act or not act.

Dr. Mechanick reviewed, as had the defense experts, the Department of Correction's records of Cooke's "feces" incident in September 2005.[69] He saw no relationship between that incident and other things in those records which bore any relationship to Cooke's mental status three months earlier when these crimes were committed. His behavior in September was not psychotic but an appearance of psychosis. He noted there was no prior history of Cooke being psychotic before September, and he was not in April or May. To get out of his isolated confinement and have more human contact, and

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[67] Defendant's exhibit 6, Bates # 1293-94 in 1984; Bates # 2083.

[68] Defendant's exhibits 6 and 11.

[69] Defendant's exhibits 10.

maybe help his defense, Dr. Mechanick suggested the possibility of Cooke malingering.

He also said that core characteristics of ASPD are repeated criminal conduct and antisocial behavior. Cooke had both characteristics along with lack of remorse, which he described as an "internal" feature of ASPD, and which is an important part of ASPD. It was Dr. Mechanick's understanding that the Delaware Code excluded ASPD as a psychiatric disorder which would qualify as a "psychiatric disorder" for guilty, but mentally ill. Dr. Mechanick told the jury that Cooke did not have in April/May 2005 any psychiatric disorder which either (1) affected his thinking feeling or behavior, or left him with insufficient willpower to choose, (2) whether he would commit the crimes, or (3) whether he would refrain from committing these offenses.

Cooke's evidence of guilty, but mentally ill, which if believed by the jury, would lead to such a verdict, opened the door to rebuttal evidence of his post-murder criminal conduct in Atlantic City.[70] It also related to the diagnosis of ASPD (criminality). The defense agreed about the admissibility of this conduct evidence but sought to have proof presented only through the police reports of the incidents. After examining them, the Court determined that they were insufficient to convey the details of what the

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[70] *People v. Santarelli*, 49 N.Y.2d 241, 425 N.Y.S.2d 77, 401 N.E.2d 199 (N.Y.1980).

jury should know. The State, therefore, presented victims of Cooke's conduct in Atlantic City in June, 2005.

1. Mildred Boody, now seventy-two years old, saw Cooke sitting [on] a neighbor's porch. This was June 6th around 6:30 a.m. Over an hour and a half later as she went to leave, she discovered Cooke crouched down by her back door. He was wearing and also carrying a white t-shirt and a switchblade knife. He grabbed her arms and put his finger under her bracelet. [] "Give me your jewelry or life," Cooke said. There was a struggle and he broke off the bracelets, but he dropped them as Boody screamed and scratched him. He did not pick them up.[71]

2. Angel Rojas on June 6, 2005 was asleep in his bed around 4:00 a.m. when Cooke entered a window to his bedroom, pointed a gun at his head and pulled his hair; "Don't move or I'll kill you," Cooke said. He wanted money. A housemate came in and got into a tustle with Cooke. Cooke wanted the roommate's necklace which he took off and gave to him. He also wanted his cell phone, but apparently never got it. He took other things from the house. Before leaving they went

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[71] Cooke in a later statement denied this. He said he only touched Boody *after* the incident to calm her down.

downstairs where Cooke had Rojas put his hands up on the wall.

3. Kathy Chao, now sixty-three years old, was falling asleep after 11:00 p.m. June 6th. She heard a noise and then sensed someone at her bedroom door. The intruder had a mask. He sat on her bed and placed his hand on her neck saying, "Don't talk, don't move." She complied. At one point she heard things falling out. She had had her credit cards and $120.00 dollars in a black pouch on the night stand near her bed. While she remained in her bed, the intruder went to other rooms in the house. One time he came to her and asked where her money was. At another point, he flipped back the blanket, under which she had been sleeping, but put it back. He snatched the necklace off her. He stole a ring, a cell phone, and three credit cards, too.

   When Cooke was arrested in Delaware a day or so later, Chao's three credit cards were on him.

The Court has gone to what might be considered as unusual lengths to review the evidence presented during the guilt phase. There are three reasons. One is the testimony and opinions of Doctors Turner and Bernstein for the defense. It was necessarily extensive. And the defense introduced many, many records about Cooke's youth which related to their diagnoses. The jury had a lot to consider with just

that evidence. The second reason is that the evidence in the guilt phase carries over to the penalty hearing.[72] There is a third reason. When instructing the jury on the features of guilty, but mentally ill, the Court said:

GUILTY, BUT MENTALLY ILL

> Another possible verdict as to all charges which I have just defined that you may consider is "guilty, but mentally ill." This verdict is appropriate if you determine that, at the time of the conduct charged, the defendant suffered from a psychiatric disorder, and that disorder either substantially disturbed his thinking, feeling or behavior or left him with insufficient willpower to choose whether to do the act or not, even if he was physically capable of refraining from doing it.
>
> Before you can consider this possible verdict for any of these charges, however, you must first find that the State has established the defendant's guilt as to that charge beyond a reasonable doubt. If you find the defendant not guilty of any charge or charges, you do not consider this possible verdict as to that charge.

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[72] *Flamer v. State*, 490 A.2d 104 (Del.1983); cert. denied, 464 U.S. 865, 104 S.Ct. 198, 78 L.E.2d 173 (1983); 474 U.S. 865, 106 S.Ct. 185, 88 L.Ed.2d 154 (1985).

The term "psychiatric disorder" means any mental or psychotic disorder recognized by the field of psychiatry as affecting a person's behavior, thinking, feeling or willpower.

Under Delaware law, anti-social personality disorder by itself does not constitute a psychiatric disorder as I have just defined those words for you. The verdict of guilty but mentally ill is not available if the psychiatric disorder was caused by the voluntary ingestion or inhalation of intoxicating liquor or drugs.

You need not find that the mental illness caused the defendant to commit the offenses with which he is charged.

There are three bases for returning a verdict of "guilty, but mentally ill" for a defendant who suffers from a psychiatric disorder. The first is where a defendant's psychiatric disorder substantially disturbed his thinking, feeling or behavior. The second is where defendant's disorder substantially disturbed his thinking, feeling or behavior and left him with insufficient willpower to choose whether to do the act or refrain from doing it. The third is where defendant's disorder left him with insufficient willpower to choose whether to do the act or refrain from doing it.

Neither the State nor the defense has the burden of proving that the defendant is guilty but mentally ill. You, the jury, have the option of returning a verdict of "guilty,

but mentally ill" if you determine that such a verdict is warranted by the evidence as to any charge or charges (emphasis added).[73]

The underlined (only for purposes of this opinion) language was given after days of debate involving counsel and the Court. It is indispensable and pivotal to this case. It is pivotal because, when testifying, Dr. Mechanick said:

Defense Counsel: And, Doctor, even if you did feel that he was schizotypal or mixed personality with schizotypal, schizoid and paranoid features – you're of the opinion that even if he had those illnesses, they weren't substantially affecting his thinking, feeling, or behavior during the conduct in question in this trial, correct?

Doctor: That's correct. Again, we have to look at the particular disorder and ask the question, how was it substantially affecting his thinking, feeling or behavior. And when we go through – I won't belabor it right now. When we go through each of these criteria, the question would be in what, if any, was this substantially

[73] Instruction to the Jury dated March 5, 2007, p. 22-23.

affecting his thinking, feeling or behavior and what evidence is there that he was under the burden of one of those personality disorders at the time of the crime. And, again, I won't go into great detail, but as I've testified, we have several versions from him, none of which, in my opinion, show evidence that the [sic] was suffering substantial burden from any of those disorders at the time of the crime, nor does the physical evidence, the police evidence that I've reviewed indicate that he was substantially burdened by any of those disorder [sic]. So that's my opinion.

Defense Counsel: Doctor, did you diagnose James Cooke as suffering or laboring under an anti-social personality disorder at the time of these offenses, correct?

Doctor: Yes.

Defense Counsel: And you believe that that did substantially affect his thinking, feeling, and behavior, correct?

Doctor: Yes.[74]

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[74] Trial transcript of cross-examination of Dr. Mechanick, dated February 26, 2007.

He also testified that at the time of these offenses, Cooke was "suffering" from a mental illness that substantially affected his thinking, feeling, and behavior.[75] But, he went on to say that his understanding of Delaware law is that ASPD does not qualify as a "psychiatric disorder" [ ] as encompassed by § 401(b). This view of Delaware Law was shared by defense experts Dr. Turner and Dr. Bernstein.

Even though these three mental health experts agreed Delaware Law excludes ASPD as a basis for finding a defendant guilty, but mentally ill, the issue is, nonetheless, one of statutory interpretation. Such a task is a judicial one. The Court, therefore, prior to instructing the jury as it did, had to engage in this interpretive process. This became necessary because of the statutory language in § 401 and because of Dr. Mechanick's diagnosis. If ASPD is a personality disorder – mental illness – which, under the statute, cannot be a basis for a finding of guilty, but mentally ill and the jury accepted his diagnosis, the verdict would be guilty (there was no real issue of being not guilty).

The starting point for all of this, of course, is the statute itself:

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[75] Trial transcript of cross-examination of Dr. Mechanick, dated February 26, 2007.

401 Mental illness or psychiatric disorder

(a) In any prosecution for an offense, it is an affirmative defense that, at the time of the conduct charged, as a result of mental illness or mental defect, the accused lack substantial capacity to appreciate the wrongfulness of the accused's conduct. If the defendant prevails in establishing the affirmative defense provided in this subsection, the trier of fact shall return a verdict of "not guilty by reason of insanity."

(b) Where the trier of fact determines that, at the time of the conduct charged, a defendant suffered from a psychiatric disorder which substantially disturbed such person's thinking, feeling, or behavior and/or that such psychiatric disorder left such person with insufficient willpower to choose whether the person would do the act or refrain from doing it, although physically capable, the trier of fact shall return a verdict of "guilty, but mentally ill."

(c) It shall not be a defense under this section if the alleged insanity or mental illness was proximately by the voluntary ingestion, inhalation or injection of intoxicating liquor, any drug or other mentally debilitating substance, or any combination thereof, unless such substance was prescribed for the defendant by a licensed health care practitioner as

> was used in accordance with the directions of such prescription. As used in this chapter, the terms "insanity" or "mental illness" do not include an abnormality manifested only be repeated criminal or other nonsocial conduct.[76]

There are several fundamental rules of statutory construction which courts must use when interpreting a statute. In interpreting a statute, the Court's function is to determine and to give effect to the legislature's intent.[77] Statutes must be read as whole and all words must be given effect.[78] Where a statute is unambiguous and there is no reasonable doubt as to its meaning, the Court must give effect to its literal meaning.[79] If a statute is reasonably susceptible of different conclusions or interpretations, it is ambiguous.[80] Also, ambiguity can result if an interpretation leads to an absurd result.[81] Finally, if uncertainty exists, the statute must be viewed as a

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[76] 11 *Del. C.* § 401.

[77] *Coleman v. State,* 729 A.2d 847, 851 (Del.1999).

[78] *Nationwide Ins. Co. v. Graham,* 451 A.2d 832, 834 (Del.1982).

[79] *Coastal Barge Corp. v. Coastal Zone Ind. Control Bd.,* 492 A.2d 1242, 1246 (Del.1985).

[80] *Snyder v. Andrews,* 708 A.2d 237, 241 (Del.1998).

[81] *Newtowne Village Service Corp. v. Newtowne Rd. Dev. Co.,* 772 A.2d 172, 175 (Del.2001).

whole, and the Court must seek to harmonize it and avoid mischievous or absurd results.[82]

With these statutory construction principles in mind, the Court had to first determine if the statute is or is not ambiguous. By law, the catch line to § 401 "Mental illness or psychiatric disorder" is not part of the substantive language contained in § 401.[83] This means [for] determining possible ambiguity or interpreting the language of the statute itself, a court cannot use the catch line. The issue of whether the statute is or is not ambiguous arises, initially, from two of its subsections. In § 401(b) the words "mental illness" are not used. Instead, in (b) the words are "psychiatric disorder." But in § 401(c), the potential exclusion of ASPD contained in the last sentence refers to "mental illness" and not to "psychiatric disorder." But the exclusionary language in that last sentence refers to "chapter." Chapter refers to all of Chapter 4 of Title 11.[84]

Since subsection (c) refers to chapter and chapter includes all of § 401, a threshold issue arises whether the exclusionary language in (c) encompasses (b). That question arises, as noted, because (c) uses "mental illness" and (b) uses "psychiatric disorder." If just these two subsections are considered, it is arguable whether an ambiguity exists because the

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[82] *Watson v. Burgan*, 610 A.2d 1364, 1368 (Del.1992).

[83] 1 *Del. C.* § 306.

[84] §§ 401-477.

two seemingly different terms are meant to describe different things. An adequate interpretive analysis cannot end with just these two subsections, however, even though in isolation, this Court maintains ambiguities exist in them. By using "chapter" in (c) the analysis necessarily becomes broader than just examining § 401.

As noted, the word "chapter" controls all of Chapter 4. Included in Chapter 4 is § 408 which was enacted with and when § 401 was amended to establish the verdict of guilty, but mentally ill. That section, in pertinent part, states:

> § 408. Verdict of "guilty, but mentally ill" – Sentence; confinement; discharge from treating facility.
>
> (a) Where a defendant's defense is based upon allegations which, if true, would be grounds for a verdict of "guilty, but mentally ill" or the defendant desires to enter a plea to that effect, no finding of "guilty, but mentally ill" shall be rendered until the trier of fact has examined all appropriate reports (including the presentence investigation); has held a hearing on the sole issue of the defendant's *mental illness,* at which either party may present evidence; and is satisfied that the defendant was in fact *mentally ill* at the time of the offense to which the plea is entered. Where the trier of fact, after such hearing, is not satisfied that the defendant was *mentally ill* at the time of the offense, or determines that the facts do not support a "guilty, but

> mentally ill" plea, the trier of fact shall strike such plea, or permit such a plea to be withdrawn by the defendant. A defendant whose plea is not accepted by the trier of fact shall be entitled to a jury trial, except that if a defendant subsequently waives the right to a jury trial, the judge who presided at the hearing on *mental illness* shall not preside at the trial.[85] (Emphasis added)

In addition, §§ 408(b) and (c) use the term "mental illness." The words "psychiatric disorder" do not appear anywhere in § 408. This choice of words is crucial because § 408 is the statutory provision setting out the sentencing and treatment process for persons who plead or are found guilty, but mentally ill. Sections 401(b) and § 408, therefore, are inextricably intertwined. They must be read in *pari materia*.[86] When that is done, it is manifest that the General Assembly found the phrases "psychiatric disorder," "mental illness," and "mentally ill" to be the same and interchangeable.

Even though different terms are used in § 401(b) and § 408, the conclusion remains the same that the legislature viewed them as meaning the same thing. For one thing, § 401(b) would otherwise become hopelessly ambiguous. The verdict or finding is "guilty, but mentally ill" not "guilty but suffering from, or by

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[85] 11 *Del. C.* § 408(a).

[86] *State Farm Mut. Auto. Ins. Co. v. Wagamon*, 541 A.2d 557, 560 (Del.1988).

reason of, a psychiatric disorder." And, if the two terms were not synonymous, there would be a disconnect between § 401(b) and § 408 whereby a person would have a *psychiatric disorder* but would be unable to get treatment for mental illness for which § 408 provides. Such would clearly be an absurd result, and Courts are admonished not to interpret statues in a way that lead to absurd results.[87]

The Court stated earlier that § 408 was enacted at the same time § 401 was amended to include a new subsection (b) to allow for a verdict or finding of guilty, but mentally ill. Reference to legislature [sic] history is appropriate when seeking to resolve ambiguity.[88] Section 401 was amended in 1982 in response to the Hinkley shooting of President Reagan and the later verdict in that matter. The amendment process began with H.B. 567 of the 131st General Assembly. This bill repealed § 401 as it then existed and substituted three new subsections. As originally proposed in HB 567, they read:

> Section 1. Amend § 401, Chapter 4, Title 11 of the Delaware Code by striking said section in its entirety, and substituting in lieu thereof the following:

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[87] *E.I. duPont de Nemours & Co. v. Clark*, 88 A.2d 436, 438 (Del.1952).

[88] *A & P Stores v. Hannigan*, 367 A.2d 641, 643 (Del.1976).

§ 401. Insanity; Mental Illness; Defense and Verdicts

(a) In any prosecution for an offense, a defendant may move for a verdict of "not guilty by reason of insanity" only after a finding by the trier of facts that, at the time of the conduct charged and as a result of mental illness or mental defect, such defendant lacked substantial capacity to appreciate the wrongfulness of his conduct.

(b) Where the trier of fact determines that, at the time of the conduct charged, a defendant suffered from a psychiatric disorder which substantially disturbed such person's thinking, feeling or behavior and/or that such psychiatric disorder left such person with insufficient willpower to choose whether he would do the act or refrain from doing it, although physically capable, the defendant may move for a verdict of "guilty, but mentally ill."

(c) It is shall [sic] not be a defense under this section if the alleged insanity or mental illness was proximately caused by the voluntary ingestion, inhalation or injection of intoxicated liquor, any drug or other mentally-debilitating substance, or any combination thereof, unless such substance was prescribed for the defendant by a licensed health care practitioner and was used in accordance with the directions of such prescription. As used in this chapter, the terms "insanity" or "mental illness" do not

include an abnormality manifested only by repeated criminal or other non-social conduct."[89]

HB 567 also sought to create a section dealing with the process for determining the sentence and for the treatment process of persons found guilty, but mentally ill. As introduced, this section was to be placed in the Delaware Code as a new section § 407. It later became and now appears as § 408. The proposed new § 407 had three parts. As originally proposed, subsection (a) was written as it now appears in § 408(a). To note again, that subsection uses the words "mental illness" not "psychiatric disorder." Subsection (b) as first proposed did not use either term.

HB 567 was amended, however, by HA 2 as it went through the legislative process before what is now §§ 401 and 408 became law. One part of the amendment was a change to the proposed § 401(a) and is not pertinent to the issue at hand. Section 401(b) was not amended. But Section 407(b) was amended, and it read as it is now found in § 408(b). The revised subsection 408(b) used the term "mental illness."[90] As has been shown, § 408 is the necessary sentencing and treatment adjunct to § 401(b). The relevant sentence of § 408 reads:

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[89] H.B. 567, Section 1.

[90] HA 2 to HB 567.

> The Commissioner shall thereupon confine such person in the Delaware Psychiatric Center. Although such person shall remain under the jurisdiction of the Department of Correction, decisions directly related to treatment for the *mental illness* shall be the joint responsibility of the Director of the Division of Substance Abuse and Mental Health and those persons at the Delaware Psychiatric Center who are directly responsible for such treatment. (Emphasis the Court's).[91]

This statutory and enactment of history alone is sufficient to unequivocally demonstrate that to the General Assembly – and hence to the courts – the terms "mental illness" and "psychiatric disorder" mean and are to be interpreted to mean the same. When § 407(b) was amended in HA 2, the Legislature did not chose to say "psychiatric disorder" in that section as these terms appeared in § 401(b) in HB 567. Of course, it would have been preferable to have used the same term throughout.

There is more in this legislative history which manifests that "psychiatric disorder" and "mental illness" are synonymous. In HB 567 the original § 407(b) did not include either of those terms. In that bill's original version of § 401(b) the phrase "psychiatric disorder" exists. In HA 2 to HB 567, there was no change in the wording of § 401(b). But when

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[91] 11 *Del. C.* § 408.

§ 407(b) was changed by the amendment, the words "mental illness" were used. It is noteworthy, therefore, since the amendment came later in time, when amending § 407(b) and using the term "mental illness," the Legislature, did not find it necessary to change the words in § 401(b) or use the term "psychiatric disorder" in the revised § 407(b).

While the amendment to § 407(b) was offered to add (and clarify) the relationship of the Department of Correction to the Department of Health and Social Services), the basic intent was retained. That intent was to provide treatment of persons determined to be "guilty, but mentally ill." And for what, under § 407(b) were such persons to be treated? They are to be treated for "mental illness" and not "psychiatric disorder." In short, the General Assembly in 1982 saw no distinction between these two terms and that they are one and the same thing.

The statutory language in §§ 401 and 408 lead [sic] to the conclusion as noted. But if any doubt lingers, HB 567 has a lengthy synopsis (expression of legislative intent) and it removes any such lingering doubt:

> Synopsis to HB 567: In criminal trials, those defendants who claim to have been suffering from a temporary mental illness at the time of the offense have long been a problem for the courts because the line between sanity and insanity often is not clear. Among courts and law enforcement agencies there is the growing conviction that of persons who were in fact mentally ill during the commission of

the offenses, such mental illness for many did not (or should not have) sufficiently affected such person's ability to obey the law. In many states such a person presents juries with the difficult choice of either returning a finding of *guilty* (even though the jury may feel compassionate because of the defendant's mental problems); or *not guilty* by reason of insanity (even though the person appears to be able to appreciate the criminal nature of his conduct and is able to conform his conduct with the requirements of law, notwithstanding such person's *mental illness*).

Several states have developed an alternative verdict of "guilty, but insane" or "guilty, but mentally ill." In these states, a jury may recognize a defendant as being *mentally ill,* but nevertheless hold him responsible for his criminal actions; provided however, that the *mental illness* does not negate the defendant's ability to understand the unlawful nature of his conduct, and his ability to conf[o]rm his actions to the requirement of law. Where this alternative verdict has been rendered, the person convicted is sentenced under the criminal law and remanded to the Department of Correction after psychiatric evaluation by the State. If such person requires further treatment for the mental illness, that is provided. If the *mental illness* occurred only at the time of the offenses and is not in evidence at the time of incarceration, such person is returned to the Department of Correction for the completion of the sentence. Such a statute enable juries

to recognize that some defendants are *mentally ill,* but that such *mental illness* is not related to the crime committed; nor to the defendant's possible culpability for it. It would also enable a jury to be confident that a defendant that is incarcerated as a result of its verdict will receive treatment for the *mental illness* involved while he is confined.

On August 17, 1981 the United States Attorney General's Task Force for Violent Crime issued its Final Report, which recommends legislation that would create an additional verdict in federal criminal cases of "guilty, but mentally ill." *This act is a "guilty, but mentally ill" statute. Under this legislation, if the defendant has committed the offense (but is nevertheless adjudged to have been "insane" or "mentally ill" at the time of the commission of the offense) and is convicted, he nevertheless receives the needed psychiatric evaluation and treatment. In addition, further evaluation and/or treatment for the defendant's mental condition is required as a condition for parole, in the event that the defendant is ever eligible for parole.* This Act is based on former House Bill 770 of the 129th General Assembly, and contains the same intent as that legislation. HB 567, 131st General Assembly. (Italics the Court's).[92]

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[92] Synopsis HB 567.

First, the italicized language uses "mentally ill" and not "psychiatric disorder." Second, the principle at work here is that a person found to be guilty, but mentally ill can receive the same sentence as if the verdict were guilty, but now there is a major new component for such persons: treatment. And the treatment in the statutory language and in the synopsis is for "mental illness."

It is, of course, unclear and unknown where the term "psychiatric disorder" came from and why it was used in that one place in (b) when "mentally ill" or "mental illness" is used everywhere else in all the applicable statutes. The conclusion remains, however, that to achieve a harmonious result from these different terms the two terms are synonymous.[93]

There is also compelling decisional support for this conclusion. In *Daniels v. State,*[94] the Supreme Court had its first opportunity to address § 401(b) since its enactment in 1982. In that case, the Supreme Court stated that Delaware's law was patterned after the Michigan law of guilty, but mentally ill and "fit" within the Michigan statutory pattern.[95]

Curiously, the Michigan law in effect then – 1982 – to which the *Daniels* Court referred and which is

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[93] *State Dep't of Labor v. Reynolds,* 669 A.2d 90, 93 (Del.1995).

[94] 538 A.2d 1104 (Del.1988).

[95] *Id.*, at 1108.

reviewed in several Michigan decisions cited by the *Daniels* Court – did not use the words "psychiatric disorder." It used "mentally ill." Nor was there any exclusionary language in the Michigan statute in any way comparable to § 401(c).[96] This comparison between the two states' laws strongly suggests the *Daniels* Court saw no distinction between mental illness and psychotic disorder and believed the terms to be interchangeable. It is interesting to note that Michigan subsequently amended its statute to now provide: (1) the defendant must prove mental illness at the time of the offense and (2) that the defendant did not establish by a preponderance of the evidence that he or she lacked the substantial capacity to appreciate the nature and quality of wrongfulness of the conduct or to conform his or her conduct to the requirements of the law.[97]

To make the "fit" noted in *Daniels,* any distinction between "psychiatric disorder" and "mental illness" could not exist. Also, the same link occurs in Michigan

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[96] "Sec. 36.(1) If the defendant asserts a defense of insanity in compliance with section 20a, the defendant may be found 'guilty but mentally ill' if, after trial, the trier of fact finds all of the following beyond a reasonable doubt:

"(a) That the defendant is guilty of an offense.

"(b) That the defendant was mentally ill at the time of the commission of that offense.

"(c) That the defendant was not legally insane at the time of the commission of that offense. M.C.L.A 768.36 (1975).

[97] M.C.L.A 768.36 (2002).

between a finding of guilty, but mentally ill and the consequent need for treatment. The most important point of that fit is that §§ 401(b) and 408 cannot be viewed in isolation from each other but are inextricably linked. All roads in Michigan and Delaware lead back to the synonymous nature of these terms as used in our statutes.

The Court must note that the current § 408(a) describes guilty, but mentally ill as a "defense." In the landmark case of *Sanders v. State,*[98] the Supreme Court correctly held that such a verdict or finding was not a "defense."[99] Arguably, that holding could be used to show some ambiguity in the statutory scheme for guilty, but mentally ill. But since 1990, it has not been viewed as a defense, and whether arguable or not, it does not affect the ineluctable conclusion set out above.

In *State v. Aizupitis,*[100] however, this Court offered to the jury a definition of psychiatric disorder as meaning any "mental or psychotic disorder recognized within the realm of psychiatry as affecting a person's behavior, thinking, feeling or willpower."[101]

It is unknown where the trial judge obtained that definition. It does not appear in the Criminal Code

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[98] 585 A.2d 117 (Del.1990).

[99] *Id* at 130-31.

[100] 699 A.2d 1098 (Del.Super.1996).

[101] *Id* at 1104. This language is now in this Court's pattern instructions but the source is *Aizupitis*

nor does it appear in the DSM-IV-TR. Dr. Mechanick testified there is no such distinction in psychiatry as this Court drew in *Aizupitis*. Perhaps the judge in *Aizupitis*, tried to assist the jury in understanding there could be a difference since the *defense* was not guilty by reason of insanity. That defense arises under § 401(a) and the statute uses "mental illness." But the close analysis of the legislative history draws no such distinction. When *Aizupitis* was on appeal, the issue of this Court's definition of "psychiatric disorder" was not raised nor mentioned in the appellate decision.[102]

The resolution that § 401(b) encompasses "mental illness" leads to the next issue. That issue is whether ASPD is "exempted" as a mental illness which can be the basis for a finding of guilty, but mentally ill. The resolution of that issue starts with the diagnostic criteria for ASPD contained in DSM-IV-TR, which, though quoted previously, are recited here:

> Diagnostic criteria for 301.7 Antisocial Personality Disorder
>
> A. There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following:

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[102] *Aizupitis v. State*, 699 A.2d 1093 (Del.1997). The definition of "psychiatric disorder" appearing in this Court's pattern instructions comes directly from *Aizupitis*. It, too, has no other known or independent origin.

1. failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest
2. deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure
3. impulsivity or failure to plan ahead
4. irritability and aggressiveness, as indicated by repeated physical fights or assaults
5. reckless disregard for safety of self or others
6. consistent irresponsibility, as indicted by repeated failure to sustain consistent work behavior or honor financial obligations
7. lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another

B. The individual is at least age 18 years.

C. There is evidence of Conduct Disorder with onset before age 15 years.

D. The occurrence of antisocial behavior is not exclusively during the course of Schizophrenia or a Manic Episode.[103]

These are the diagnostic criteria (along with some explanatory pages from the DSM) which were shown to the jury. But that was not the DSM in effect when the revised § 401 and § 408 were enacted in 1982.[104] DSM-III was and for ASPD it provided:

Diagnostic criteria for Antisocial Personality Disorder

A. Current age at least 18.

B. Onset before age 15 as indicated by a history of three or more of the following before that age:

1. truancy (positive if it amounted to at least five days per year for at least two years, not including the last year of school)

2. expulsion or suspension from school for misbehavior

3. delinquency (arrested or referred to juvenile court because of behavior)

4. running away from home overnight at least twice while living in parental or parental surrogate home

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[103] DSM-IV-TR, State's exhibit 178.

[104] 63 *Del. Laws* c. 328.

5. persistent lying

6. repeated sexual intercourse in a casual relationship

7. repeated drunkenness or substance abuse

8. thefts

9. vandalism

10. school grades markedly below expectations in relation to estimated or known IQ (may have resulted in repeating a year)

11. chronic violations of rules at home and/or at school (other than truancy)

12. initiation of fights

C. At least four of the following manifestations of the disorder since age 18:

1. inability to sustain consistent work behavior, as indicated by any of the following: (a) too frequent job changes (e.g., three of more jobs in five years not accounted for by nature of job or economic or seasonal fluctuation), (b) significant unemployment (e.g., six months or more in five years when expected to work), (c) serious absenteeism from work (e.g., average of three days or more of lateness or absence per month, (d) walking off several jobs without other jobs in

sight (Note: similar behavior in an academic setting during the last few years of school may substitute for this criterion in individuals who by reason of their age or circumstances have not had an opportunity to demonstrate occupational adjustment)

2. lack of ability to function as a responsible parent as evidenced by one or more of the following: (a) child's malnutrition, (b) child's illness resulting from lack of minimal hygiene standards, (c) failure to obtain medical care for a seriously ill child, (d) child's dependance [sic] on neighbors or nonresident relatives for food or shelter, (e) failure to arrange for a caretaker for a child under six when parent is away from home, (f) repeated squandering on personal items, of money required for household necessities

3. failure to accept social norms with respect to lawful behavior, as indicated by any of the following: repeated thefts, illegal occupation (pimping, prostitution, fencing, selling drugs), multiple arrests, a felony conviction

4. inability to maintain enduring attachment to a sexual partner as indicated by two or more divorces and/or separations (whether legally

married or not), desertion of spouse, promiscuity (ten or more sexual partners within one year)

5. irritability and aggressiveness as indicated by repeated physical fights or assaults (not required by one's job or to defend someone or oneself), including spouse or child beating

6. failure to honor financial obligations, as indicated by repeated defaulting on debts, failure to provide child support, failure to support other dependents on a regular basis

7. failure to plan ahead, or impulsivity, as indicated by traveling from place to place without a pre-arranged job or clear goal for the period of travel or clear idea about when the travel would terminate, or lack of a fixed address for a month or more

8. disregard for the truth as indicated by repeated lying, use of aliases, "conning" others for personal profit

9. recklessness, as indicated by driving while intoxicated or recurrent speeding

D. A pattern of continuous antisocial behavior in which the rights of others are violated, with no intervening period of a least five years without antisocial behavior between age 15 and the present time (except when the individual was

bedridden or confined in a hospital or penal institution).

E. Antisocial behavior is not due to either Severe Mental Retardation, Schizophrenia or manic episodes.[105]

These diagnostic criteria are more elaborate or detailed than those in the DSM-IV[-]TR criteria for ASPD, but the essential features are the same.[106] The point is, however, that the exclusionary language in § 401(c), "repeated criminal or other antisocial conduct" captures the basic core of ASPD as set out in 1982 DSM-III and now.

Any doubt that ASPD cannot be a qualifying personality disorder was settled in *Magner v. State,*[107] when the Supreme Court said, "A defendant suffering from anti-social personality disorder may not assert mental illness as a defense."[108] While the Supreme Court in *Sanders* said that guilty, but mentally ill was not a defense, it did in a case a year later, however, refer to it as a "defense."[109] By the same token, as noted earlier, § 408 refers to guilty, but mentally ill as a "defense." In short, whether labeled or mislabeled as a defense, the exclusionary language in *Magner* is just as valid.

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[105] DSM-III, 301.70, p. 321.

[106] *See* pp. 22-23 above.

[107] 1998 WL 666726 (Del.).

[108] *Id* at *1.

[109] *Stansbury v. State,* 591 A.2d 188 (Del.1991).

It is of no moment that *Magner* used "mental illness" and not "psychiatric disorder." For one, that would implicitly render meaningless the word "chapter" in § 401(c) as the Legislature could easily have said "except in subsection (b)" but did not do so. Second, it makes no sense to reach the conclusion that ASPD is excluded from § 401(a) but not § 401(b). To do so renders the last – exclusionary – sentence of § 401(c) to be meaningless, also. Courts do not exist to render statutes meaningless.

There is solid statutory support for this statement in *Magner*. The phraseology of § 401(c) manifests the General Assembly was aware of antisocial behavior by repeated criminal conduct. That such persons should not be the object of guilty, but mentally ill is manifest. Would it have been helpful to have specifically mentioned "Anti-Social Personality Disorder" in § 401(c)? Obviously, yes. But its primary diagnostic features are stated.

Dr. Mechanick testified that § 401(c) described two of the three most important elements of ASPD: repeated criminal conduct and antisocial conduct. The words "nonsocial conduct" in (c) is another way of expressing antisocial conduct. The unstated third key diagnostic criteria is lack of remorse. Dr. Mechanick saw that Cooke had none for the offenses for which he was on trial nor for his extensive prior criminal conduct. Further, psychiatry offers another, independent peg in the columns supporting § 401(c)'s language and *Magner's* statement. Dr. Mechanick said ASPD is not treatable.

One of the two goals in 1982 and present and into the future, both in terms of statutory language and the synopsis, is that certain mental illnesses are treatable. It would be a glaring anomaly if ASPD qualified as a mental illness under § 401(b) when it is a non-treatable condition.

These are the reasons this Court was bound and compelled to affirmatively instruct the jury the ASPD is not a basis for a finding guilty of, but mentally ill.

The jury instruction on guilty, but mentally ill was the only major area of controversy in the instructions. The parties agreed to the sentence concerning voluntary intoxication which was part of the instruction.[110] The presentation of evidence concluded on February 28, 2007. The jury was instructed on March 5, 2007, finishing up around 4:00 p.m., but it chose not to start deliberations that day. It deliberated all day March 6th but before starting, it asked for a list of all exhibits (State had 184 and the defense 21).

During its all-day deliberations on March 7th, the jury asked the following questions and was given the answers as noted:

> In count 4 Burglary 1st degree # 5 states the intent to commit some act which is defined in our Criminal Code as a crime. In this case, the State contends that the defendant intended to commit the crime of rape.

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[110] 11 *Del. C.* § 421.

1) Does jury need to find defendant entered for purpose of rape? Or is any intended crime sufficient?

Answer: The defendant entered or remained unlawfully in a dwelling. A person enters or remains unlawfully in a place when he has no license or privilege to be there; that is, he does not have the permission or consent of the owner of the place to be there; and entered or remained are stated in the disjunctive. They are not the same. When either of these elements, therefore, is proven to your satisfaction beyond a reasonable doubt, this first element of this charge of burglary is established.

2) If other crimes are committed upon entering, are the [sic] sufficient to satisfy "any offense included within that offense"?

Answer: The crime of rape in the first degree as charged in the indictment is the only offense you can consider.

The jury was also instructed to review the entire instruction on the elements of burglary. Interestingly, over the thirty-three years since the Criminal Code became effective, this jury's first question raised an issue of statutory construction not yet addressed *explicitly,* as far as this Court was aware, or could find, by any Delaware Court.

The offense of burglary in the second degree is defined as:

> A person is guilty of burglary in the second degree when the person knowingly enters or remains unlawfully:
>
> (1) In a dwelling with intent to commit a crime therein; or
>
> (2) In a building and when, in effecting entry or while in the building or in immediate flight therefrom, the person or another participant in the crime:
>
> a. Is armed with explosives or a deadly weapon; or
>
> b. Causes physical injury to any person who is not a participant in the crime.

In an attempt to correctly answer the jury's question, the parties and the Court engaged in some research independent of each other.

The Court, as a trial attorney and in other functions, was intimately familiar with the prior law on burglary and the substantive change made when the Criminal Code became effective in 1973. The Court "went back" to that law which provided in pertinent part:

> "Whoever breaks and enters . . . with the intent to commit any crime therein . . .[111]

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[111] 11 *Del. C.* § 395 – repealed in 1973.

The 1973 statute eliminated the element of "breaking." Some of the anomalies of the ancient common law regarding the concept of breaking are recited in the Commentary to the Criminal Code.[112] In its research, the Court re-read the Commentary as it related to prior law on burglary and the change made in 1973. Regrettably, there was nothing explicit there about "or remains". The phrase "enters or remains unlawfully," however, is a defined one. It appears in 11 *Del. C.* § 829(d) and (e):

> (d) A person "enters or remains unlawfully" in or upon premises when the person is not licensed or privileged to do so. A person who, regardless of intent, enters or remains upon premises which appear at the time to be open to the public does so with license and privilege unless the person defies a lawful order not to enter or remain, personally communicated by the owner of the premises or another authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public.
>
> (e) A person "enters" upon premises when the person introduces any body part or any

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[112] The elements of the Model Penal Code in existence in 1973 expressly did *not* have the concept of "or remains." Commentary, pp 248-249.

> part of any instrument, by whatever means, into or upon the premises.

This definition, too, provided (and provides) no explicit answer to the jury's question. That codified definition has remained unchanged since added to the Code in 1973.

Again, as part of its research to develop an answer, the Court reviewed the Commentary to § 829. There was no explicit answer there either. One helpful part to the Commentary, however, was the statement, "It discards the archaic concept of 'breaking.'" [113] The statutory definition of "enters or remains," was implicitly helpful, nonetheless.

To understand why, the Court reviewed Delaware case law on the crime of burglary as it existed prior to 1973. It had been Delaware law for 160 years that the specific crime the burglar intended to commit prior to or when breaking and entering had to be alleged in the indictment.[114] This principle was restated in *State v. Minnick*.[115] In that case the issue was whether an indictment charging burglary with the intent to commit a crime sufficiently charged burglary. This Court said it did not.[116]

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[113] Commentary p. 256.

[114] *State v. Eaton*, 3 Har. Del, 554 (*Del. O & T* 1840).

[115] 168 A.2d 93 (Del.Super.1960).

[116] *Id* at pp 96-97.

Since the intent under the prior burglary jurisprudence had to be formed *prior* to that magic point of *breaking* (which at long-standing common [law] was the crossing of some invisible line – trespass – whether or not some tangible object like a door was opened or broken), the removal of the "archaic" concept of breaking had to mean something when coupled with the new word *and* concept meant by "or remains." This Court believed fundamental common sense meant that with these changes, (1) a person could enter lawfully, but after remaining unlawfully, form an intent to commit a crime, (2) or that it meant one entered unlawfully to commit one crime but while remaining unlawfully formed the intent to commit another. It made no sense to come to a different conclusion.

If the former law required a specific intent to be formed (and the specific crime to be charged) *prior to entry,* the 1973 revision to "or remains" had to cover: (1) entering lawfully, (2) but then remaining unlawfully, and (3) at that point forming (and later being charged with) a specific crime, or to mean (1) unlawfully entering with an intent to commit one crime, but (2) while unlawfully present (remaining) forming an intent to commit a different crime. This was clear because the repeal of just entering meant there was no longer that invisible line to be crossed by which time under the repealed law the intent had to be formed. From 1973 on, that intent could be formed while remaining unlawfully. Not only did common sense lead this Court to this conclusion, to have held

otherwise would eviscerate "or remains" and perhaps engage in ill-advised judicial legislation. This Court was not prepared to do that.

While the precise issue may be somewhat novel, the Court readily found during its research on the question some helpful Delaware case authority. In *Miller v. State,*[117] the Supreme Court acknowledged the *disjunctive* of "enters or remains." (emphasis added). Therefore, since these words are disjunctive and since one who forms an intent to commit a specific crime at that point either entering unlawfully or remaining unlawfully (and is appropriately so charged), either of the two above scenarios apply and are quite reasonable. Neither offends but each is consistent with the statutory language. If the words are not disjunctive, what do the words enters or remains § 829 mean? And if conjunctive, that, this Court determined would necessarily mean the intent to commit the crime to be committed inside has to be formed prior to entry. In that case, "or remains" becomes meaningless.

Without knowing for sure, but based on the evidence, it is most likely the jury was asking that, in order to find Cooke guilty of this burglary charge, did it have to find he formed the intent to commit rape prior or at the point of entry. Based on the evidence recited earlier, particularly the Harmon and Cuadra burglaries, it is most likely he entered *unlawfully* to

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[117] 426 A.2d 842 (Del.1981).

commit theft but once inside Bonistall's apartment, which is not a public place and where he never had a license or privilege to be for any purpose, when confronting her, he formed the intent to rape her. When he formed that intent inside her apartment there is no doubt he had already remained unlawfully. The parties' research offered no contradiction to how the Court answered the jury question.

The jury's question was well posed and correctly answered.[118]

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[118] The Court, as noted, answered the jury's questions on March 7, 2007 in a way it believed and still believes is the correct interpretation of the phrase "enters or remains." Two months after this Court provided the jury with its answers and bases on the reasons stated, the Supreme Court decided *Dolan v. State*, 925 A.2d 495, 2007 WL 1366511 (Del.). Even though this Court's answers and its reasoning for them and this portion of the sentencing decision were written prior to *Dolan*, candor, respect and intellectual honesty compel it to note the *Dolan* decision.

In *Dolan*, the Supreme Court said that the same burglary statute at issue in Cooke meant that the intent to commit a crime must be formed prior to or up to the point of entry. This is required, the *Dolan* court said, even if the original entry were illegal and the intent formed while remaining unlawfully.

Most curiously, there is no mention of *Miller*, its holding of the disjunctive nature of "enters or remains," or any effort, of course, to distinguish it. Oddly, not even the State cited *Miller*. As one basis for its holding, the *Dolan* court noted it picked the "majority" of decisions in other states which have reached this same conclusion. But the court also relied on the pre-1973 law on burglary that the intent had to be formed prior to entry, *Dolan* citing *State v. Edell*, 183 A. 630 (Del.Gen.Sess.1935).

(Continued on following page)

On March 8, 2007 around 11:15 the jury returned its verdict finding Cooke guilty as charged of all counts.

Penalty Phase

Because of the convictions for intentional murder (Count I), felony-rape-murder (Count II), and rape first degree (Count III), a penalty hearing was mandated. The hearing began March 13, 2007. As indicated, the jury was instructed that all the guilt phase evidence was carried over and to be considered in the penalty phase.

Statutory Aggravating Circumstances

The State offered one statutory aggravating factor:

> The murder was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after

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With deepest respect and humility, *Dolan* cannot be squared with *Miller*. Nor does *Dolan* adequately explain the judicial neutralization of "or remains." The law on burglary pre-1973 was substantively amended in 1973 and re-linking intent time up to "Entry" (described as "archaic" by others) as before without recognition for the charge [sic] is, at best, problematical. The factual setting in this case could not more starkly show where, most respectfully, *Dolan* is incorrectly decided. This Court, at least, for all the compelling reasons used to reach the answers given to this jury, urges reconsideration. If none, perhaps the Legislature should re-examine the burglary statutes.

committing or attempting to commit rape in the first degree.[119]

The jury was instructed that because of its guilty verdicts on Counts II and II [sic] it had already found this statutory factor existed beyond a reasonable doubt.[120]

Non-Statutory Aggravating Circumstances

The State offered these non-statutory aggravators.

1. *The particular circumstances and details of the commission of the offenses set forth in the indictment.*

The Court has described many of the details of Bonistall's rape and murder. It was brutal. She fought back leaving the teeth marks in a forcibly inserted mouth gag and suffered punches to the face. Cooke had to press hard on her chest to strangle the life out of her with one of her own garments. He bound her with electrical cord. The mere act of strangulation when the victim fights back, as here, discloses a prolonged – even in minutes – intent to murder. It was not an instant death via a gun shot.

He set fire in an apartment building. First, to cover up what he did to Bonistall, but second, it was in a building that was occupied by others. And, of

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[119] 11 *Del. C.* § 4209(e)(1)j.

[120] *Steckel v. State*, 711 A.2d 5 (Del.1998).

course, he sought to throw off the police by the wall writings about drugs and KKK.

Did Cuadra escape the same murderous fate by pressing 911 on her cell phone and screaming for Carolina Bianco? There is a good chance she did. The details of all of that have been set out earlier. Fortunately Cheryl Harmon was not home when Cooke broke into her apartment and stole things. And then, there were the wall writings he did in her apartment, so very-similar-to-the ones in Bonistall's apartment. Both sets of writing were intended to mislead the police.

All of this occurred in a period of over four to five days. There was more than ample evidence of this aggravating circumstance and it carries significant weight.

2. *Character and propensities of the defendant.*

Cooke's extensive criminal history will be covered as a separate aggravator. He has had a number of children by seven women and owes back child support to each. He cannot or chooses not to keep a steady job. He was thirty-four when these crimes were committed. In the Court's discussion of other non-statutory aggravators, there will [sic] more details on this circumstance.

There is one record among the thousand or so pages in evidence that bears special mention on this factor. It was made when Cooke was two months short of his eighteenth birthday (when he was half of

his current age). Despite the lapse of time, it has some chilling, prescient, and even current value:

> There is something evil about this young man. He has been uncooperative, making demands of the staff and instigating trouble. He can't understand why he is here – nothing (according to him) that he does is wrong. He has been behind every evil thing that has happened at the shelter since he has been here. It is impossible to talk to him. His language is offensive and he has no respect for anyone. Some of my staff has refused to work while he is here. They are intimidated by his behavior as he has been assaultive to them. James' presence undermines the order of the house. He needs to be in a more secure, structured environment with psychiatric care.[121]

This aggravating circumstance was well established. It, too, carries substantial weight.

3. *Impact of indicted crimes on Lindsey Bonistall's family.*

Lindsey Bonistall's mother, father, and older sister testified. The family is devastated. Lindsey was described as warm, hilarious, and sensitive. The Bonistall family is quite extended because of the number of siblings Mr. and Mrs. Bonistall have.

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[121] Defendant's exhibit 11, Salem County JINS Shelter, Progress Report dated September 20, 1988.

There were large gatherings on holidays but no more since the murder. Lindsey's older sister Kristen and Lindsey were close; Kristen expected her to be her maid of honor. She said she was "drowning" without her. When her own apartment was burglarized some time after Lindsey's death, she had a relapse and had to undertake therapy.

Mrs. Bonistall described Lindsey as a bundle of energy. She played sports, was senior class president in high school and an honor student. She had given Lindsey a guitar because she wanted to learn to play. It was the very guitar Cooke put on top of Lindsey's body with other flammables. Mrs. Bonistall said the family was "broken."

Mr. Bonistall had established a close father-daughter relationship. He described their relationship as "best friends," "confidant," and his "fashion coach." When driving together, they would sing. He was a regular attendee at church and sang in the choir of their Catholic church, but has not gone to church since the murder. There is no "healing," he said.

This non-statutory aggravating factor has been established.

4. *Impact of indicted crimes upon close friends of Lindsey Bonistall.*

Two of her close friends testified. One was Christine Bush, her apartment-mate who was away when this happened, and Nicole Gengaro. Their

descriptions of Bonistall matched those of her parents; "smart," "caring," "spontaneous," "told lots of jokes," "bubbly," "witty." Bush said Bonistall was close to her father.

Bush did not go back into the apartment after the fire. She observed from outside the blackened window in Bonistall's bedroom. She became scared when shown the wall writings. She went home for a week, but returned to the University still not feeling safe.

Both young women said that Bonistall's murder had made them to be [sic] more sensitive and compassionate to others.

This non-statutory aggravating factor was established.

5. *The defendant attempted to disparage the character of Lindsey Bonistall.*

This circumstance was established in several ways. First, was in the way he described the alleged consensual sex with her, her alleged promiscuity, her alleged drug use on prior occasions, her alleged (and not substantiated by toxicology results) consumption of "wet" on May 1st, which he recited to Dr. Turner or Dr. Bernstein, or both, and to Dr. Mechanick.

During his testimony in the guilt phase, he said Bonistall was not the person they say she was, that he was set up because he had sex with Bonistall, and that Bonistall's parents did not want to accept her behavior.

It is important to note that Cooke may have made other disparaging remarks about Bonistall which (1) were made outside the jury's presence or (2) in records or things not placed into evidence. Under 11 *Del. C.* § 4209, the sentencing judge can only consider those items that were properly before the jury (which also means, of course, anything the jury was instructed to disregard cannot be considered). The point is, the Court has not based its ultimate decision or its decision that this factor was established on anything other than that which was properly before the jury. It is important to explicitly state this because of the various events during the trial.

6. *The particular circumstances and details of the commission of each of the crimes for which the defendant was either convicted or adjudicated delinquent, including (but not limited to) the following:*

The precise conviction or adjudications of delinquency are set out in State's trial exhibit 184 (Attachment A to this opinion), and State's penalty hearing exhibits 1P, 2P, 3P, 4P, 5P, 6P, 22P and 23P. As far as these convictions and delinquency adjudications, this non-statutory circumstance was established.

The State also produced Anna Sauer who had lived in Salem, New Jersey in 1983. Cooke, at age

thirteen, threw a rock at the back of her head in an unprovoked attack.[122] She had several months of pain and treatment. Despite seeing Cooke several times later, he never apologized.

Sauer also testified that she encountered Cooke's mother one time and that she was nasty to her. This is just one of many examples of the mother's attitude with which he had to grow up. More will be said in the discussion of the mitigating circumstances, but the Court felt it important to mention it here.

The State produced several law enforcement officers from Salem, New Jersey. Each was personally familiar with Cooke. One incident described involved drug charges in 1991 (he was twenty or twenty-one).[123] Cooke was arrested several times for serious drug offenses. On this occasion, after he was initially taken to the Salem City police department, he managed to escape. His mother brought him back several hours later.[124]

The police who dealt with Cooke over the years in Salem described him as "a troublemaker," "belligerent," "arrogant," and "showed no respect for authority." He often resisted arrest, and there are juvenile and

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[122] Refer to aggravated assault adjudication in May, 1983 listed in exhibit A.

[123] Refer to exhibit A, adult convictions, and to State's penalty hearing exhibit 1P.

[124] Record of escape conviction is State's penalty hearing exhibit 2P.

criminal convictions/delinquency adjudications for such.

One of his victim's was Irene Sorell, an aunt. He stole her car in 1997 (he was twenty-seven) and received a nine month jail sentence.[125] Cooke had several adult serious drug convictions. In 1997 he had "sale weight" drugs in 39 baggies on him and $310.00.[126] In 1999 he had $1,147.00 on him.[127]

Another victim was Vicky Waller. While approaching her place of employment in Atlantic City, Bally's, around 6:20 a.m., in October, 1997, Cooke cut the strap on her pocketbook and then she and he tussled. He ran off with it but was soon caught. Her back hurt for several weeks.[128]

With the testimony of the various witnesses and the records put in evidence, this circumstance was established. It is an important circumstance in the weighing process.

7. *The particular circumstances and details of the commission of four home invasion burglaries committed by the defendant in June, 2005, in Atlantic City, New Jersey.*

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[125] State's penalty hearing exhibit 3P.

[126] *See* State's penalty hearing exhibit 4P.

[127] *See* State's penalty hearing exhibit 5P.

[128] The record of his conviction for this, a theft, is reflected in State's trial exhibit 184 and State's penalty hearing exhibit 6P.

These incidents were described in detail by the various victims during the State's rebuttal portion of the guilt phase of the trial and need not be repeated here.[129] This evidence was to be and could also be considered as part of the penalty phase. The guilt phase testimony described earlier established this non-statutory aggravating circumstance. It has some significance because of the violent nature of confrontations and because all of it occurred *after* Bonistall's murder. That temporal proximity and the nature of the acts make this an important non-statutory aggravator.

8. *Acts of domestic violence committed by the defendant against Rochelle Campbell.*

The evidence of this did not come from Campbell herself before the jury. It came from Dr. Turner's interviews with her when developing a background for his ultimate diagnosis. Based on that, the Court finds this circumstance established, but finds it hard, as a result, to attribute much weight.

9. *The future dangerousness of the defendant.*

Based on Cooke's unceasing criminal activity from adolescence to incarceration on these charges when thirty-five, there is sufficient basis for this

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[129] *Supra* pp. 40-41.

concern.[130] It must be balanced to an extent, by the lack of significant bad behavior (with the exception of the incidents in the Fall of 2005) while in DOC custody from early June, 2005, to March, 2007, and while in New Jersey (adult) state prison. On the other hand, a pastoral counselor, James Walsh,[131] testified that Cooke is a "very dangerous person." He finds the offenses in this case not surprising for Cooke in light of his violent upbringing.

Out of jail, as these crimes and the Atlantic City crimes demonstrate, there is a strong potential for future dangerousness. He is never been out of jail long before re-offending. That he would rape and murder and, just over a month later, engage in further violent conduct underscores this propensity, and the escalation to more violence and willingness to confront his victims is most worrisome.

Mitigating Circumstances

The first eight (with subparts) mitigating circumstances presented by the defense without Court annotation, alone detail significant mitigating circumstances. By necessity, they were enumerated in the guilt phase of the trial to help explain the diagnoses Doctors Turner and Bernstein reached.[132]

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[130] *See also*, the quote in the section on the defendant's character, *supra* p. 71.

[131] Defendant's penalty hearing exhibit 4P, his CV.

[132] *Supra* pp. 18 and 24.

Even the State, at several points in the guilt phase, described Cooke's childhood as "horrible," "horrific." The emotional scarring and risk for later problems are and were real. There was well-documented and frequent significant physical and emotional abuse inflicted on Cooke as a youngster.

As has been noted, there were several thousand pages of DYFS, Salem Hospital, CHOP and Juvenile Parole records put into evidence. Some records relate to one of his sisters, Elesia, and show she was often the same target of verbal and physical abuse as Cooke; in both cases, frequently by their mother, Paula Turner. Turner was nineteen when she gave birth (prematurely) to Cooke. She was a drug addict. She was quite emotionally ill-equipped to care for children and severely mistreated Cooke.

As to the mitigating circumstances the defense presented:

1. *Significant physical insults and injuries suffered by James Cooke during his early childhood including but not limited to:*

a. *Born three months premature with a birth weight of three pounds, thirteen ounces.*

This fact appears in Defendant's exhibit 5. Cooke's experts explained a premature birth and low weight can have an impact because the brain is not yet as fully developed as if he had gone to term.

b. *Diagnosed with malnutrition at age four months.*

This, too, is well documented.[133] It has an impact on physical development (size, etc.) and on brain development. It is but one, and an early one, example of Paula Turner's profound neglect of Cooke.

c. *Severe burn injuries to feet and lower legs at age twenty-five months inflicted by mother's boyfriend.*

This incident is particularly striking and upsetting. It is documented by pictures,[134] DYFS records,[135] and by CHOP records.[136] This incident has had a major influence, decidedly negative, impact [sic] on his upbringing and continues to have an adverse influence. It would be grossly understating a cliche to say it "scarred" him for life. And it is no cliche because the physical scars are real and exist now.

His mother did not seek immediate medical treatment. Eventually, Cooke did get care at CHOP. There he had frequent surgeries to repair the skin and some other damage, but 100% restoration did not occur.[137] The injuries are permanent and this is a significant mitigating circumstance because of that.

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[133] Cooke's exhibit 6A

[134] *See* Defendant's exhibit 6 and 8A-G, the latter taken later in life.

[135] Defendant's exhibit 6.

[136] Defendant's exhibit 7.

[137] Defendant's exhibit 6.

It has a troublesome side, though. The physical and emotional scars are permanent and explain, in part, Cooke's propensity for violence.

d. *Multiple surgical procedures performed upon James Cooke's feet to alleviate some of the permanent injuries sustained in the aforementioned burning incident.*

CHOP hospital records substantiate this circumstance.[138] Those records also reflect occasions when Cooke came in malnourished and yet he ate well and readily while at CHOP. The records also report there were times when he screamed, was uncooperative, combative and had to be restrained. They also show there were times when he was just the opposite. All of this, of course, occurred when he was just over two years to about four years old.[139]

2. *James Cooke was raised in an environment characterized by poverty and physical neglect during childhood and accordingly:*

a. *James Cooke frequently went hungry.*

This mitigating circumstance is amply established in the DYFS and Juvenile Probation records.[140] Cooke stole to get food, he frequently showed up at school hungry. His undernourished status is even noted in

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[138] Defendant's exhibit 7.

[139] Defendant's exhibit 7A.

[140] Defendant's exhibits 6 and 11, respectively.

the CHOP records. Some of this has been discussed earlier when reviewing his history considered by the three mental health experts.[141]

There is no question of the poverty in which he and his siblings were raised, and the neglect by his mother and her various boyfriends which compounded that destitute situation.

b. *James Cooke's clothing was frequently filthy.*

This circumstance is also well documented in the DYFS records.[142]

This second circumstance can be amply summarized from a report when Cooke was about thirteen and half:

> On the whole James seems to be the product of a socially, culturally and materialistically deprived environment. He is essentially undersocialized, selfish, egocentric and very angry.[143]

3. *Unstable home environment as evidenced by the fact that James Cooke lived in twelve different homes as a child.*

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[141] *See, e.g., supra* pp. 16-28 and 30-40.

[142] Defendant's exhibit 6. *See* more particularly exhibit 6, Bates # 001714 – at age 9; Bates # 1646

[143] Dr. Munoz report dated April 24, 1984; Defendant's exhibit 6G.

Cooke's half-brother, Ricky Patillo, Jr., and half-sister Eleisa Cooke testified about how they, Cooke, and the other kids lived in twelve different locations while growing up.[144] This mitigator was established. It also played a role in Doctor Turner's diagnosis.[145]

4. *Emotional abuse and neglect, including, but not limited to the following:*

a. *James Cooke's siblings were preferred because of the perception that James Cooke's birth had caused the breakup of the marriage between Paula Cooke and James Cooke, Sr.*

The evidence here suggests James Cooke, Sr., upon seeing the defendant when born or shortly thereafter, led him to conclude he was not the defendant's biological father. He left, never to return. There was some testimony that, indeed, that departure and the alleged reason led to Cooke being the victim of various kinds of abuse from his siblings and/or Paula Turner, her paramours, and she showing less interest in him.

b. *Repeated verbal denigration of James Cooke by his mother Paula Turner and her paramours.*

It is not clear that James Cooke, Sr.'s abandonment was the cause of the denigration. But the

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[144] Defendant's exhibit 9 lists them (some are listed twice) and may show more than 12.

[145] *Supra* p. 19.

testimony from Ricky Patillo, Jr., Eleisa Cooke, and the records establish this circumstance.

c. *Being picked on and ridiculed by other children at school during childhood.*

Again whether Cooke Sr.'s departure was the catalyst for this ridicule, Ricky Petillo [sic], Jr., confirmed that the ridicule occurred. Cooke was subjected to ridicule by other students when he was placed in special education. This mitigating circumstance was established.

d. *James Cooke had a childhood history of trauma and victimization without the benefit of treatment.*

While Cooke received extensive treatment for his burn injuries, it was unquestionably traumatic. The DYFS records[146] depict some of the injuries. Other injuries are documented in those records and received no treatment. He was sexually abused at thirteen and half when in a juvenile facility.[147] This circumstance is thoroughly documented. It is part of the larger picture of the "horrible" childhood he endured.

5. *Despite multiple interventions by the Division of Youth and Family Services, Public Health Nursing, as well as foster placements, James Cooke was never removed from this abusive environment promptly or*

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[146] *See, e.g.*, Defendant's exhibit 6, Bates # 1322.

[147] Defendant's exhibit 62.

for long enough to escape the emotional and physical disarray that resulted.

Defendant's exhibit 6, the DYFS records of over a thousand pages clearly establish this circumstance. If anything, these records show Cooke is a "poster child" for official neglect and mismanagement. In fairness, some of the problems were at an age before he was "in the system."

6. *James Cooke was diagnosed with learning disabilities, including ADD and Learning Disorder by Dr. Stephen Mechanick.*

Dr. Mechanick's testimony and the DYFS records established this mitigating circumstance.

7. *The absence of a stable and/or loving father figure for James Cooke, his mother had at least five different live-in boyfriends while James was a child.*

It is unclear the number live-in boyfriends was established. Nevertheless there were several. It is also established there was no such father figure for Cooke. This circumstance was substantiated.

8. *Inconsistent, inappropriate and often violent discipline by James Cooke's mother and her boyfriends, including, but not limited to, beatings with hoses, extension ends, belt buckles and switches.*

Most of this has been already covered. The DYFS records, including photographs, the testimony of Ricky Patillo, Jr., and Eleisa Cooke detailed this mitigating circumstance. The accumulation of all this

has had a profound influence on Cooke, and not a good one.

9. *Various mental health professionals, including but not limited to, those who testified at trial, have diagnosed James Cooke as suffering from some form mental illness.*

Cooke's extensive history of mental health exams and diagnoses have been enumerated throughout this decision. The written records support the existence of this circumstance.[148] The testimony of all three mental health experts who testified at trial has been set out in detail. James Walsh, the pastoral counselor who testified during the penalty phase is another who underscored the existence of this circumstance, as did Dr. Howard Stevenson, a psychologist and teacher at the University of Pennsylvania. He testified in mitigation.

10. *In the summer of 2004, James Cooke experienced the death of his seven year old son, Semaj.*

As stated, this mitigating circumstance was proven. There are mixed factors to this circumstance. At Semaj's death, Cooke was under a no-contact order with him and his mother. This stemmed from an assault on her. Cooke was also in support arrears, yet he was supposedly upset, according to his mental

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[148] Defendant's exhibits 6 and 11.

health witnesses,[149] with the mother's bad living conditions. This incident was about ten months prior to the rape/murder. It is difficult to gauge what consequence, in the grand scheme of later events, Semaj's death in 2004 had on Cooke, in April, May 2005.

There is some evidence Semaj's death justifiably upset Cooke, but it is difficult to assign value or weight to this circumstance. More will be covered on family relationships in the discussion of circumstance number twelve.

11. *Notwithstanding some inconsistency in his relationships with his family members, James Cooke is loved by his mother, to the best of her ability, and siblings, and they would suffer great loss were the State to execute him.*

Cooke's mother did not testify during any phase of this proceeding. Two siblings and one cousin testified: Ricky Patillo, Jr., Eleisa Cooke, and Karlen Sorrell; all of whom testified during the guilt phase. All had, as previously discussed, spoke of Cooke's trouble-plagued youth and had witnessed the unequal discipline or verbal abuse meted out to Cooke by their mother, her boyfriends, and his school mates. While inappropriate to have said so during the guilt phase, there was some apparent attachment or affection

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[149] *See, e.g.*, Dr. Turner's report dated June 26, 2006, p. 12, Defendant's exhibit 4.

implicitly manifested by all toward Cooke. Eleisa Cooke, as the DYFS records documented, was subjected to much of the abuse Cooke was and which was out of proportion to their siblings.

Without more, however, and considering Turner's years of abuse of Cooke and her absence from the witness stand, this circumstance as it involves her is due little weight.

12. *James Cooke has developed a loving relationship with his children by Rochelle Campbell. Those children would suffer great loss were the State to execute him.*

During the penalty phase, a DVD was played[150] showing Cooke's children by Campbell speaking with him. They were in his lawyers' office and he was in jail.[151] The youngest of the four was too young to converse (born June 2005). Several of the children seemed most anxious to speak with him. There was a caring interchange between those children and Cooke.

One reason for this to be done by video and preserved on DVD is just that: to be able to show it to me and the jury. This could not have been done if the visit was in jail. But the children's mother, Campbell, does not like taking them for such visits. She was

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[150] Defendant's penalty hearing exhibit 9.

[151] The hook up was the videoconferencing system between the Public Defender's office and the Department of Correction.

asked only one question in the penalty phase: if the children wanted to visit their father in jail, would she take them? She said she would. But her limited role in the penalty hearing and just that one question manifest a chasm in her relationship with Cooke.

Dr. Stevenson, [sic] said that Cooke had become attached more to the children he had by Campbell than to his other children and that the relationship should continue. He said Cooke wanted to avoid having these children suffer the pain he endured as a child.

Lay witness neighbors of Cooke in Newark, who had identified him on the wanted poster, testified at trial about how they were able to do so and, thus, this evidence carried over to the guilt phase. They had seen him with his children (by Campbell) playing in Dickey Park. Even though they also saw him playing basketball, they noticed his "tippy toe" gait. There was, therefore, "independent" corroboration of a positive relationship between Cooke and those children.

Two of the children, Tyree Campbell, age ten, and Terence Campbell, age eight, testified.[152] They spoke lovingly of their father. They want to be able to visit him. Both have exchanged letters with Cooke. It is

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[152] Counsel noted at side bar that none of the children knew what the charges were or the only two potential penalties.

reasonably clear that Cooke's death would have a negative affect on them.

As it would on Kwasha Whitaker, age fourteen, a son by another woman. Turner actually brings her [sic] and a half-brother (both of whom live in New Jersey) to visit with Cooke. In that Turner does this, there is a modicum of caring she may have. The children talk to him about school, as was the case with the kids and Cooke on the DVD. He gives them advice, such as, to be around good kids. These two children would like to continue their visits and would be upset if they no longer could. Dr. Stevenson testified that Cooke has the potential of giving positive feedback to his children.

Dr. Stevenson also said that Semaj's death was a big turning point in Cooke's life. He seemed to say that it may have motivated him to be a better parent to his children by Campbell. Walsh noted Cooke became depressed and suffered deep grief as a result of Semaj's death. Cooke told him that instead of only selling drugs, as he had before, he started to use them and drank more.

Walsh said Cooke's crimes in 2005 had to be viewed in the context of Cooke's religious "conversion" (*see* # 15) and Semaj's death. The Court is unclear what this means as no one satisfactorily tied the impact of Semaj's death to the onset, deterioration of or anything in any of the disorders diagnosed. The Court does not doubt there was an impact on him, but

it fails to see its role in the brutal rape and murder of Bonistall.

In sum, Cooke's relationship with some of his children is [a] mitigating circumstance. Its weight is unclear because it was these children with whom he lived when he committed all of these offenses and whom he deserted several days later.

13. *James Cooke has behaved well while incarcerated in the past and during his present incarceration.*

Except for the "feces incident" in early September, 2005, there is no record of misbehavior while in custody [i]n Delaware, and this is a positive. David Holman, the Delaware Correctional Center Security Superintendent, testified that most inmates act out in their first few months of incarceration. If they do not, the likelihood is greater that their later behavior will be better. The records from Cooke's adult New Jersey imprisonments reflect the same lack of discipline problems. A psychologist, Dr. Robert Haskins, performed an evaluation on Cooke while he was incarcerated in 1994 in New Jersey (Cooke would have been twenty-three). Part of his evaluation reflects the lack of problems while Cooke was incarcerated, but his entire conclusion should be stated:

> CLINICAL IMPRESSION NARRATIVE: (To include a discussion of developmental history,

past behavior, analysis of current and institutional behavior test results and a DSM-III-R diagnosis if relevant. Recommendations for institutional programming can also be included.)

Mr. Cooke is a twenty-three year old black male who admits he was selling CDS for profit. Background data may be found in a 2/10/93 Admission report by this writer. He has made an excellent institutional adjustment and appears to have benefitted from the punitive aspect of his incarceration. Clinically, he is seen as an inadequate, mildly sociopathic person who sold CDS for profit. He does appear remorseful for his crime.

DX: 301.70 Anti-Social Personality Disorder.[153]

14. *James Cooke has helped other inmates while in prison in the past, and there is reason to believe that he would continue helping inmates in the future.*

There is no real evidence of this proffered mitigating circumstance.

15. *James Cooke has reconnected with his faith through his relationship with Reverend James Beardsley; and*

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[153] State's exhibit No. 183.

16. *Reverend Beardsley has developed a close friendship with James Cooke, so his exception* [sic] *by the State would cause great loss to Reverend Beardsley.*

These two mitigating circumstances should be discussed together. They need to be put in context. First, it is far from clear based on the circumstances of his upbringing that Cooke had any religious faith with which to reconnect. Second, the context is that Cooke told several of the mental status experts that an older prisoner he encountered while in jail in New Jersey in 1997 helped him become religious.

This experience prompted Cooke to make a number of notes in the margin of a bible and write letters to Campbell in "King James like" phraseology which Dr. Turner and Dr. Bernstein noted in their diagnoses.

Walsh, too, mentioned the role of Cooke's religiosity. He said Cooke told him God forgives and has compassion for sinners. Walsh described other beliefs Cooke had developed from his own interpretations of the Bible. Walsh saw Cooke on six occasions from March 2006 to June 2006 and describes his religiosity as "fervent." Despite this religiosity, Walsh described Cooke as a "very dangerous person." ASPD, he said would be very difficult to treat and at age thirty-six, Cooke was still dangerous.

Reverend James Beardsley has seen Cooke continuously since July 2005[164] He testified it took a while to gain Cooke's trust. The reverend believes that Cooke can help other inmates. He considers Cooke a friend and "like a son." He said to execute him "would be like losing a son."

This mitigating circumstance was established and has some weight.

17. *A sentence for life in prison without the possibility of modification or reduction meant that James Cooke will spend everyday of the rest of his natural life in prison.*

The thrust of this "mitigator" is that because of the circumstances of a (possible) life sentence in a first degree murder case, Cooke will serve it in near isolation with limited privileges and visitation in the Secure Housing Unit (SHU). In part, it would be harsh and unpleasant and, implicitly, a worse and more appropriate sentence (even though the law views the death sentence as the worst), and also, such a sentence would not be easy and would be severe. He also would be isolated from society.

Holman, from the Delaware Correctional Center, explained the many limitations placed on prisoners

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[164] The Court wishes to express particular gratitude to Reverend Beardsley who attended most of the trial proceedings, and who, on occasion, spoke to Cooke in lock-up areas seeking to get him to behave in order [sic] he could be present in the courtroom.

serving such sentences. They are significant. Most of the time is spent in isolation and with little human contact. Pictures of the small cells in which these sentences are served were admitted.[155]

The State countered by showing that over half of inmates serving first degree murder sentences are not serving their sentences in SHU but in lower levels of classification. In these levels they have more privileges, visiting privileges, and human interaction.

There is no way to predict how long Cooke would be in SHU if sentenced to life. For sure, it would be a while and it would not be pleasant.

While this "mitigator" was established, it is difficult to assign the degree of weight to it in light of the possibility of not being in SHU for the remainder of Cooke's life.

Cooke declined to take the witness stand in the penalty phase and testify under oath. He did, however, start to offer some remarks in allocution, but his remarks became contentious in context and tone, basically contemptuous. Even with the broad parameters of allocution,[156] his remarks went too far.

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[155] Defendant's penalty hearing exhibits 1P, 2P, and 3P.

[156] *Capano v. State*, 781 A.2d 556 664 (Del.2001).

The Court and his counsel were compelled to intercede to cut it short.[157]

Deliberations

After summations and charge on March 19th, the jury deliberated for a little over two hours in its penalty recommendation and recessed for the night. On March 20th, as it had in the guilty phase, it asked for and was given a list of all the penalty hearing exhibits (a total of thirty-five). On March 21, 2007 it returned with its verdict just before 10:30 a.m.

As instructed, because of its verdicts in the guilt phase, it found the one statutory aggravating circumstance existed beyond a reasonable doubt.

As to the two counts of murder, intentional and rape/murder, the jury unanimously recommended the Court impose the death sentence.

The Weighing Process

The weighing process is not counting the number of aggravators versus the number of mitigators.[158] As part of the weighing process, the Court is to give the jury's recommendation "consideration as deemed

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[157] The Court is mindful of Cooke's right to allocute and the breadth of that right and was reluctant to curtail it for that reason. It had to, however.

[158] *State v. Cohen*, 604 A.2d 846, 849 (Del.1992).

appropriate . . . in light of the particular circumstances . . . "[159] The Court correctly instructed the jury that its recommendation would be an "important factor" in its sentencing decision.[160]

There are a number of mitigating circumstances present. Several are compelling. Cooke was born into a very dysfunctional "family" situation of a young mother incapable of caring for him and his siblings. The State's own description of Cooke's childhood as "horrific" captures the essence of the prolonged physical and mental abuse to which he was subjected. But that description does not fully describe the prolonged and severe nature of that abuse and its permanent mental and physical scarring. No child should have to endure or be victimized as he was. The details of it were replete in the record and, have been extensively set out in this decision.

All of this childhood experience increased his risk of developing some kind of personality disorder. All the mental health experts who testified agreed he developed a personality disorder. They, of course, disagree on what it was or is. The jury's guilty verdicts reflect either he had no personality disorder in April-May, 2005, or that the [sic] had ASPD which disqualifies him from a verdict of guilty, but mentally ill.

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[159] 11 *Del. C.* § 4209(d).

[160] Jury instructions. *Starling v. State,* 882 A.2d 747, 759 (Del.2005).

Anyone subjected to what Cooke was, as exemplified most traumatically by the burning of his feet and legs at age two, which left him physically scarred to this day, and the repeated beatings, would be left mentally damaged, too. All of this harmed his educational and socialization development.

To state it another way, Cooke has two intertwined mitigating circumstances: his horrible childhood and consequent mental scarring, with the development of ASPD. These circumstances carry significant weight.

There are others. He has developed some relationship with some, but not all, of his ten children. Others do not seem, however, to matter in his life. For whatever reason, he has demonstrated over a period of years disregard for his financial duties to these children. It is a cruel irony he was upset with Semaj's circumstances when his own conduct and non-support played a role in it. His inability to pay child support, in part, is due to being in jail.

Cooke does seem to have developed some religiosity over the last eight to ten years. He has read and annotated a Bible and absorbed a lot of it. But at the same time, his criminality continued despite this religious awakening. He appears, however, to have developed a meaningful friendship with Reverend Beardsley which was built around religious discussions.

Despite Cooke's statements to several of the mental health experts, there is nothing credible to indicate he knew Lindsey Bonistall before her forcibly raped, beat, and then strangled her to death. In short, she was a stranger. Even though he is developmentally undereducated, he is wise in the ways of the criminal world; he was thirty-four when he brutally strangled Bonistall.

Based on the Cuadra and Harmon incidents, it is likely he broke into Bonistall's apartment to steal something. When encountering her, his intent changed. Cuadra was likely spared the same fate barely twenty-four to thirty hours earlier because Carolina Bianco was there, and she had managed to press 911 on her cell phone which Cooke saw. After getting some of her property, he asked her to remove her clothes.

Bonistall was hit hard several times in the face. She was forcibly gagged and also tied up with the cord from an iron. For Cooke to suggest, as he did to Dr. Turner and Dr. Mechanick, that he had consensual sex is absurd (Dr. Bernstein found it incredible). He compounds it by also alternatively suggesting he got angry because she refused to have sex with him in a position he wanted.

Cooke formed the intent to and then forcibly raped Bonistall. He formed the intent to kill, also. Strangling Bonistall requires a desire to kill lasting much longer than pulling a trigger one or two times. It is particularly "up close and personal." The use of

her t-shirt and pressing on her chest betrays a cold blooded viciousness. It was a slow, painful, terrifying death.

Her murder and rape is quite consistent with his antisocial personality, criminality and disregard for the rights of others. Those traits are exemplified by his choice to enter residences at night where the chances of encountering an occupant are very high. This is what he did in the Cuadra incident and a month later in Atlantic City. He, and particularly Harmon, were fortunate she was not home when he burglarized her apartment.

His actions against Bonistall were especially cruel. She was a stranger, a totally innocent victim, had done some thing [sic] provocative to him and was undeserving of being beaten, forcibly raped, and strangled to death and suffering her own "horrific" fate.

The ultimate outrage was putting bleach on her clothes, apparently trying to destroy his DNA in the process, piling objects on her in the bathtub and setting her on fire; and in an occupied apartment building. Most mercifully for her, she was dead when he did this. But this was all his effort to disguise his culpability. He had wrote intentionally misleading words on Harmon's wall, and similar misleading words on Bonistall's walls – before he set her on fire, made the 911 call to the Newark Police on May 2nd and the "Josh Warn" call several days later, all in

days-long efforts to disguise his culpability. He likely removed the wanted poster from the Payless Store.

But his underlying criminal personality came out again a mere month later after his monstrous murder of Bonistall. And in each case he sought to and did enter a residence where there was an occupant or were occupants and got into physical confrontations with them. He does not seem to care about that.

Cooke's adult criminal history in New Jersey prior to the Bonistall murder does not have the violence component as his juvenile history did. To that extent, that is favorable to him. But what is most disturbing is that the Bonistall rape/murder, the circumstances of the Cuadra crime and the circumstances of the four incidents in June 2005 in Atlantic City reflect an alarming return to violence. They also reflect more of a willingness to get into violence-laden confrontations with strangers, all to steal (at least that was the probable initial intent for entering Bonistall's apartment). He is a "very dangerous person" indeed. That dangerousness is not going to go away.

The Court has also given the appropriate consideration in light of the particular circumstances to the jury's unanimous recommendation for a death sentence. As it was told, that recommendation is an important factor in the decision this Court has reached.

The Court finds by a preponderance of the evidence, after having weighed all relevant evidence

in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the murder and the character and propensities of Cooke, that the aggravating circumstances the Court has found to exist [] outweigh the mitigating circumstances the Court has found to exist.

Conclusion

Therefore as to Counts I and II, intentional murder and felony murder, the appropriate sentence is death as to each count.

IT IS SO ORDERED.

[Attachment A Omitted In Printing]

IN THE SUPERIOR COURT OF
THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	:	
	:	
v.	:	
	:	
JAMES E. COOKE, JR.	:	ID# 0506005981

BEFORE: THE HONORABLE JEROME O. HERLIHY

APPEARANCES:

BRENDON [sic] O'NEILL, ESQUIRE
KEVIN J. O'CONNELL, ESQUIRE
for the Defendant

EX PARTE CONFERENCE
THURSDAY, FEBRUARY 22, 2007

SUPERIOR COURT OFFICIAL REPORTERS
500 North King Street – Suite 2609
Wilmington, Delaware 19801-3725
302.255.0651

[Excerpt of Proceedings February 22, 2007]

February 22, 2007
Chambers
2:00 p.m.

PRESENT:

As noted.

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MR. O'CONNELL:

* * *

[ ] . . . We've been with him a lot, more than, I think, most counsel you'll ever have seen. I think Mr. O'Neill has met with him over 50 times and I'm probably some percentage of that. He has alternatively given us no version of what happened. He has given us a version where he confessed – and that was during January of last year – and then by the Springtime had reverted to "I didn't do it." And he's been of that solid opinion since then in varying –

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918 A.2d 1151

Supreme Court of Delaware.
In the Matter of the PETITION OF the STATE of Delaware FOR a WRIT OF MANDAMUS.
No. 54, 2007.

Submitted: Feb. 15, 2007.
Decided: Feb. 16, 2007.

Loren C. Meyers, and Paul R. Wallace, Department of Justice, Wilmington, DE, for the State of Delaware.

J. Brendan O'Neill, Kevin J. O'Connell, Bernard J. O'Donnell, and Nicole M. Walker, Assistant Public Defenders, Wilmington, DE, for Defendant James E. Cooke.

Charles M. Oberly, III, and Karen V. Sullivan, Oberly, Jennings & Rhodunda, P.A., Wilmington, DE, for Judge Jerome O. Herlihy.

Before STEELE, Chief Justice, HOLLAND and BERGER, Justices.

HOLLAND, Justice:

This Court has before it a petition that seeks to invoke its original jurisdiction for the purpose of issuing an extraordinary writ. The petition was filed by the State of Delaware and requests that this Court issue a writ of mandamus to Superior Court Judge Jerome O. Herlihy. The underlying matter that gave rise to the present proceeding is an evidentiary ruling during an ongoing capital murder trial.

James E. Cooke ("Cooke"), who is represented by two attorneys, is charged with First Degree Capital Murder and other serious offenses, and has pleaded not guilty. On the basis of psychiatric examinations and other evidence, Cooke's counsel intend to contest the State's proof of guilt, but also plan, concurrently, to present mitigation evidence of Cooke's mental illness. Several days prior to the beginning of trial, Cooke's defense counsel advised the trial judge that, based on their conversations with Cooke, he was not in agreement with presenting evidence of mental illness that would support a verdict of guilty but mentally ill ("GBMI").

The State seeks review of an order issued January 30, 2007, in which the Superior Court denied a motion made by prosecutors to preclude presentation by Cooke's defense counsel, during the guilt phase of the trial, of any evidence that would support a GBMI verdict or any other mental illness defense. The State asks this Court to adopt a *per se* rule that a defense attorney is prohibited from advancing a mental illness defense in the guilt phase if the defendant is opposed to that approach. Neither the State, nor the attorneys for Cooke, nor the trial judge's attorneys[1] were able to find a prior case from any jurisdiction deciding that exact issue.

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[1] In accordance with Supreme Court Rule 43, the trial judge notified the Clerk of this Court that he would participate in this proceeding and retained outside counsel to represent him.

In this expedited matter, we announced our decision yesterday because the defense was scheduled to begin today in the guilt phase of the ongoing capital murder trial. For the reasons stated in this Opinion, we have concluded that a writ of mandamus proceeding is not the proper procedural context in which to decide the issue raised by the State. Accordingly, the State's petition for the issuance of an extraordinary writ is denied.

Facts[2]

On August 8, 2005, the grand jury indicted James Cooke, charging him with two counts of Murder in the First Degree, Rape in the First Degree, Burglary in the First Degree, Arson in the First Degree, Reckless Endangering in the First Degree two counts of Burglary in the Second Degree, Robbery in the Second Degree, and two counts of Misdemeanor Theft. The State is seeking the death penalty on each count of murder. Trial began in the Superior Court on Friday, February 2, 2007, before the Honorable Jerome O. Herlihy.

On Friday, January 19, 2007, Judge Herlihy conducted an office conference for the purposes of discussing jury selection and scheduling. Immediately prior to this conference, prosecutors had received information from defense counsel on the question of

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[2] These facts are taken primarily from the State's petition in this matter.

presenting a mental illness defense at trial. After the various issues about jury selection, voir dire scheduling, and the use of uncharged misconduct evidence had been discussed, Judge Herlihy asked Cooke's counsel if there were any issues they wished to raise at that time. Counsel for Cooke, J. Brendan O'Neill, Esq., responded that "there's probably something we should bring up and Mr. Cooke and co-counsel [Kevin J. O'Connell, Esq.] and I have talked about it at length." As O'Neill explained, "Mr. Cooke has one idea about how to defend this case; his counsel has a different idea."

According to O'Neill, Cooke and defense counsel had discussed his defense at great length and had essentially "agreed to disagree." Cooke had been told by counsel that in the opinion of defense counsel, "it is his lawyer's discretion whether to present a particular defense. . . ." More precisely, a decision about the purpose of the litigation rested with Cooke, but decisions about trial tactics and strategy were for counsel to make in the guilt phase of the trial. O'Neill had also told Cooke that, in any penalty hearing, counsel also made the decision about presentation of mitigation evidence.

In defense counsel's view, the defense could present evidence of mental illness to support a verdict of GBMI, yet have Cooke maintain his innocence, as he may testify that he is factually innocent of the crimes. Cooke has at all times maintained that another person committed the charged offenses. At this point, O'Neill observed that before presentation

of evidence began, they were going to need to go "hash this out on the record, and go forward from there."

Prosecutors then raised the question whether defense counsel could advance evidence of mental illness, over Cooke's objections and without undercutting a defense of actual innocence. O'Neill again observed that the question needed to be addressed formally before opening statements, including putting Cooke on the record. Prosecutors again broached this issue one week later on the afternoon of January 26.

In the view of prosecutors, it was hardly clear that defense counsel could choose to proceed with a particular mental illness defense when the defendant was adamant about his factual innocence. Given the uncertain state of the law, prosecutors indicated the State might ask the trial judge to certify questions to this Court. Before the Superior Court recessed for the day, prosecutors asked the trial judge to engage in a colloquy with Cooke, as had been suggested in the office conference on January 19. The defense took no position on whether the issue should be certified to this Court.

On January 26, the trial judge deferred any ruling on the issue. Before proceedings resumed on Monday, January 29, both the State and the defense had submitted additional memoranda to the trial judge. The trial judge indicated that no decision would be made on the issue that day.

On Tuesday, January 30, prosecutors moved to preclude the introduction of evidence, during the guilt phase, that would support a GBMI verdict or any other mental illness defense:

> unless and until one of two things happens: either counsel tells Your Honor that the extant dispute between Mr. Cooke and counsel about the pursuit of that defense has been resolved and the defendant now agrees with the presentation of the defense or unless and until Your Honor engages in a colloquy with the defendant and satisfies Your Honor that the defendant has assented to the [advancing of evidence of mental illness].

In the State's view, "the presentation of evidence supporting a GBMI verdict was sufficiently akin to a guilty plea to make the decision to present such evidence one for the defendant alone to make." The record, according to prosecutors, established that (i) defense counsel intended to pursue a verdict of GBMI; (ii) Cooke has expressly objected to his attorneys' plans; (iii) Cooke has told his attorneys "that he prefers to pursue a factual defense of innocence . . . and also does not want to hear evidence of mental illness presented on his behalf"; and (iv) defense counsel intend to present evidence of mental illness supporting a GBMI verdict, during the guilt phase of the trial, notwithstanding Cooke's wishes. After hearing from defense counsel on the issue, the trial judge denied the State's application to preclude

the defense from introducing evidence that would support a GBMI verdict.

Defense Decision Debate

A criminal defendant has authority over certain "fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."[3] Counsel, however, bears principal responsibility for the conduct of the defense.[4] In particular, counsel has the responsibility for determining "what arguments to pursue,"[5] and "what defenses to develop."[6]

According to the State, its petition presents one question: in the event of an irreconcilable disagreement between defense counsel and the defendant about a decision to seek a verdict of guilty but mentally ill, do the defendant's wishes prevail? The State is asking this Court to place the decision to pursue a mental illness defense in the category of issues upon which only the defendant can decide. Although the State has been unable to find any

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[3] *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

[4] *Id.* at 753 n. 6, 103 S.Ct. 3308; *New York v. Hill*, 528 U.S. 110, 114-15, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000).

[5] *Hill*, 528 U.S. at 115, 120 S.Ct. 659 (citing *Jones*, 463 U.S. at 751, 103 S.Ct. 3308).

[6] *Wainwright v. Sykes*, 433 U.S. 72, 93 n. 1, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (Burger, C.J., concurring).

controlling precedent that is exactly on point, it makes an argument based upon Delaware Professional Conduct Rule 1.2, Scope of Representation, which states the following:

> (a) [A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued . . . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Thus, Rule 1.2 expressly provides that the client is the ultimate decision maker as to whether to enter a plea, waive a jury trial or testify at trial.[7]

The State argues that pursuit of a GBMI verdict is the "functional equivalent of a plea of guilt with a request for mitigation of the nature of his sentence (death) or the manner it is to be served (partially in a mental facility . . .)." In response to that argument, Cooke's attorneys assert the United States Supreme Court held in *Florida v. Nixon* that a concession of

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[7] The request to expand the category of issues upon which only the defendant can decide is not without precedent. In *Red Dog v. State*, 625 A.2d 245, 247 (Del.1993), this Court expanded the list of situations where the defendant, rather than the attorney, is the ultimate decision maker to include the decision whether to forego further appeals and to accept the death penalty.

guilt is *not* the functional equivalent of a guilty plea.[8] In *Nixon,* the Supreme Court distinguished a concession of guilt from a guilty plea as follows:

> Despite [defense counsel's] concession, Nixon retained the rights accorded a defendant in a criminal trial. *CF. Boykin,* 395 U.S. [238] at 242-243 and n. 4, 89 S.Ct. 1709[, 23 L.Ed.2d 274] (a guilty plea is "more than a confession which admits that the accused did various acts," it is a "stipulation that no proof by the prosecution need be advanced"). The State was obliged to present during the guilt phase competent, admissible evidence establishing the essential elements of the crimes with which Nixon was charged. . . . Further, the defense reserved the right to cross-examine witnesses for the prosecution and could endeavor, as [defense counsel] did, to exclude prejudicial evidence. See *supra,* at 558. In addition, in the event of errors in the trial or jury instructions, a concession of guilt would not hinder the defendant's right to appeal.[9]

In *Nixon,* the defense attorney conceded guilt and then presented evidence of mental illness during the penalty phase with the goal of avoiding a death sentence. He consulted several times with his client but never obtained explicit consent to conduct the

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[8] *Florida v. Nixon,* 543 U.S. 175, 188, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004).

[9] *Id.*

defense in this manner.[10] Because the prosecution was still required to prove its case beyond a reasonable doubt, the United States Supreme Court held that conceding guilt during the guilt phase of a capital murder trial was not the functional equivalent of a guilty plea.[11] Cooke's defense counsel submit their position is strengthened by the Supreme Court's ruling in *Nixon* because, unlike the attorney in that case, they will not concede that Cooke is guilty. Moreover, Cooke's attorneys assert that a GBMI verdict is an alternative that will only be reached by the jury if they are persuaded that the State has met its burden of proof.

"In *Wainwright v. Sykes,* the United States Supreme Court held that the attorney possesses the right to decide certain strategic and tactical decisions, including what witnesses to call, whether and how to conduct cross-examination, what trial motions should be made, and what evidence should be introduced."[12] Based on *Wainwright,* Cooke's counsel assert that the decision to present evidence of mental illness at Cooke's trial is a tactical one solely within their

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[10] *Id.* at 189, 125 S.Ct. 551.

[11] *Id.* at 188-89, 125 S.Ct. 551.

[12] Phillips, Jean K. Gilles, and Joshua Allen, *Who Decides: The Allocation of Powers Between the Lawyer and the Client in a Criminal Case?,* 71-Oct. J. Kan. B.A. 28 (2002) (citing *Wainwright v. Sykes,* 433 U.S. 72, 93 n. 1, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (Burger, C.J., concurring)); *see also Strickland v. Washington,* 466 U.S. 668, 690-91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

province. Cooke's defense counsel argue that the principle that the attorney is the one who chooses whether to pursue a mental health defense was solidified by the United States Supreme Court in *Florida v. Nixon.*[13]

State Acknowledges Uncertainty

The State argues that the result in *Nixon* would have been different if the defendant had expressly objected. Nevertheless, with commendable candor the State acknowledges "the uncertain state of the law" underlying its claim. In fact, the State has consistently acknowledged that it does not have a clear right to the relief sought by its petition.

During the voir dire of prospective jurors on January 30, 2007, Deputy Attorney General Steve Wood raised the possibility of the State's making a request for certification. He noted that while no decision had been reached on whether to make such a request, the law was less than clear.

> I think it is incumbent upon me to advise the Court that there is a growing sentiment, although not a decision yet, in our office to

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[13] *See Nixon,* 543 U.S. at 190-91, 125 S.Ct. 551 (citing Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases,* 58 N.Y.U.L. Rev. 299, 329 (1983); *Performance of Defense Counsel in Death Penalty Cases* § 10.9.1, Commentary (rev. 3d 2003), reprinted in 31 Hofstra L. Rev. 913, 1040 (2003)).

perhaps ask you to certify the question of essentially who is controlling the defense [of] guilty but mentally ill versus not guilty to the Delaware Supreme Court.

The reason for that is, although we're still researching the matter, I don't know how to say this in legal language, but in a sense Your Honor is being called to make a decision in a capital case with no binding precedent that I can find or that we've found yet, not that I am a scholar here, but my reading of the cases that I've looked at, including *Florida v. Nixon,* the law review articles we've given Your Honor and everything else, is that this is about a 50-50 call, and I can't find a case right on point, and we haven't found one yet. . . .

* * *

I am – I am – rarely standing up before a court am I more uncertain about the law, and I don't mean that to sound arrogant, and I'm not trying to sound that way at all. It's just that I've read these cases, and boy, they're all over the map, and worse yet, I can't find anything, and I'm told yet that our office has not found anything that is factually on all fours; in other words, GBMI in a guilt phase versus Not Guilty by Reason of Insanity, or how one conduct[s] the mitigation case in the penalty phase.

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> [B]ut as I said before, the more I look at the cases, the more I realize that through no fault of any Appellate Court, of course, Your Honor has been in some sense cast adrift at sea, because we cannot find a case that we could site [sic] to you as binding precedent either way. What I instead found are cases that I think, in good faith, I could use to argue either side of the question.

In his email to Judge Herlihy on January 27, 2007, Mr. Wood wrote: "We remain very concerned about our inability to find clear post-*Nixon* authorities directly on point." During a conference with Judge Herlihy on January 30, 2007, Mr. Wood characterized the issue as "a close call" and the case law as "so murky." In his last communication with Judge Herlihy before the State filed its petition for a writ of mandamus, Mr. Wood wrote: "Your Honor is well aware that there is no controlling authority directly on point."

Writ of Mandamus

"A writ of mandamus is a command that may be issued . . . to compel the performance of a duty to which the petitioner has established a clear legal right."[14] Because mandamus is an extraordinary remedy, the petitioner must establish a clear right to performance of the duty in question; no other

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[14] *Clough v. State*, 686 A.2d 158, 159 (Del.1996).

adequate legal remedy is available; and the trial court has arbitrarily failed or refused to perform its duty.[15] "[I]n the absence of a clear showing of an arbitrary refusal or failure to act, this Court will not issue a writ of mandamus to compel a trial court to perform a particular judicial function, to decide a matter in a particular way, or to dictate the control of its docket."[16]

In addition,

> It is clear that only exceptional circumstances amounting to a "judicial usurpation of power" will justify the invocation of the extraordinary writ of mandamus. One who applies to an appellate court for a writ of mandamus must demonstrate to the reviewing court that the entitlement to the writ is both "clear and indisputable."[17]

Conclusion

The State has not demonstrated that it has a clear legal right to require the trial judge to preclude Cooke's defense attorneys from presenting evidence that would support a GBMI verdict. Accordingly, the

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[15] *In re Bordley's Petition for a Writ of Mandamus*, 545 A.2d 619, 620 (Del.1988) (per curiam).

[16] *Id.*

[17] *In re Petition of State for a Writ of Mandamus*, 603 A.2d 814, 815 (Del.1992) (citations omitted).

State's petition for a writ of mandamus must be denied.
